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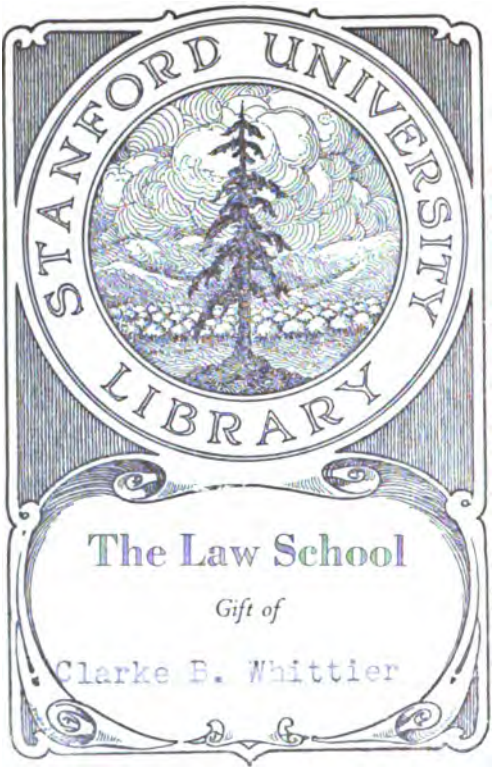

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CASES ON THE AMERICAN LAW OF CONTRACT

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SELECTED AND ARRANGED

BY

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THE BOBBS-MERRILL COMPANY
1911

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STANFORD LAW

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CASES ON CONTRACTS

THE FORMATION OF CONTRACT.

§ 1.—Agreement Defined.

An agreement in the legal sense is the union of two or more persons in a common expression of will affecting their legal relations.

Mtges. Mtge cannot be given to one's self.

GORHAM'S ADM'R v. MEACHAM'S ADM'R.

1891. 63 Vt. 231, 22 Atl. 572.

BILL in chancery by A. W. Gorham, administrator of the estate of Angeline W. Gorham, against R. S. Meacham's administrator, to foreclose a mortgage. Bill dismissed. Orator appeals.

TYLER, J.—The following facts are reported: Rollins S. Meacham, in his lifetime, was administrator with the will annexed of the estate of Angeline W. Gorham, and became largely indebted to the estate for moneys that had come into his hands as such administrator. For the purpose of securing the estate for this indebtedness, on March 1, 1889, he made and executed a promissory note for $1,550, payable to himself as administrator on demand, and in like manner a mortgage of his home place, conditioned for the payment of the note. He never settled the estate, nor rendered any account to the probate court. He converted the assets into money, and appropriated it to his own use in his private business. At the time the note and mortgage were executed, and at his decease, he was indebted to the estate to the amount of $7,000, and was insolvent. His debts, besides what he owed the estate, amounted to about $9,000, and his assets to about $4,000. The note and mortgage were retained by him, and were found after his decease in his safe among other papers that belonged to the estate, and among certain deeds and mortgages of his own. He died November 17, 1889. His wife was the daughter of the testatrix, and is the only person interested in her estate. After Meacham's decease, the defendant, as his administrator, handed the

note and mortgage to Burditt, after the latter's appointment as administrator upon the estate of Mrs. Gorham, and Burditt caused the mortgage to be recorded in the town clerk's office. The question is as to its validity.

The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. One person cannot, by his promise, confer a right against himself until the person to whom the promise is made has accepted the same. Until the concurrence of the two minds, there is no contract; there is merely an offer which the promisor may at any time retract. Chitty, Cont. 9, quoting Poth. Obl. It is essential to the validity of a deed that there be proper parties—a person able to contract, and a person able to be contracted with. 3 Wash. Real Prop. 217. To uphold this mortgage, we must say that there may be two distinct persons in one; for in law the mortgagor and mortgagee are identical. The addition of the words "executor of A. W. Gorham's estate" does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Wash. Real Prop. 279, it is said that a grant to A, B, and C, trustees of a society named, their heirs, etc., is a grant to them individually; and Austin v. Shaw, 10 Allen (Mass.) 552; Towar v. Hale, 46 Barb. (N. Y.) 361; Brown v. Combs, 29 N. J. Law 36,—are cited. In this case the grant and the habendum are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default.

Decree affirmed.

Cont. Cannot buy of self or selves.
Must be two parties. NELSON v. HAYNER ET AL.

1873. 66 Ill. 487.

AFTER the death of a partner the survivors (complainants), one of whom was the executor of the will of the deceased partner, formed themselves into a new firm and purchased from themselves the whole of the interest of the deceased at ten per cent. below its appraised value, to be paid for in four equal instalments in six, twelve, eighteen and twenty-four months, without interest or security.

Bill in chancery to confirm the sale. Decree for complainants. Appeal.

MCALLISTER, J.— * * * The decree vested the entire partnership estate in the surviving partners, absolutely; the effect would be to relieve them of the character of trustees in respect of that estate, and this without any accounting—without inquiry as to the nature

and extent of the liabilities of the several partnerships. In this view, the decree is palpably erroneous. But this is not all; it arbitrarily declares that to be a valid contract of sale, which, in the very nature of things, could not be a contract at all. To say that a man entered into a contract of sale *with* himself, or made a sale of property *to* himself is to utter a legal solecism. It is indispensable to every legal contract that there be two contracting parties competent to contract; so that, independent, altogether, of all questions arising out of fiduciary relations, this pretended purchase was void, from the fact that no man can contract with himself. Sherlock v. Village of Winetka, 59 Ill. 401.

Nor is this all. The sellers and purchasers being surviving partners, were trustees of the partnership estate. Hayner was one of them, but he was also administrator of the estate of the deceased partner; so that, he being surviving partner and administrator, was seller and buyer in the transaction, and both plaintiff and defendant in the suit for a decree of confirmation. The rule is strict that an executor or administrator cannot buy at his own sale, even though done through the intervention of another acting ostensibly as the purchaser. Such a sale is fraudulent *per se,* and can be sustained by no explanations which do not disprove the fact. Miles *et al.* v. Wheeler *et al.,* 43 Ill. 123, and cases there cited. This doctrine is based upon an inflexible rule of public policy, and which forbids these trustees, and others of a like character, from bringing their own personal interest, in any way, into conflict with that which their duty requires them to do on behalf of their *cestuis que trust.*

The decree of the court below must be reversed and the bill dismissed.

Decree reversed.

WHITE v. CORLIES.

1871. 46 N. Y. 467.

PLAINTIFF, a carpenter, received from defendants, merchants in Dey street, New York, the following note: "Upon an agreement to finish the fitting up of offices, 57 Broadway, in two weeks from date—you can commence at once." Plaintiff made no reply, but immediately purchased lumber for the work and began to prepare it. The next day defendants countermanded the work.

Action for breach of contract.

The court charged the jury: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent), before commencing the work? In my opinion it was not. He had a right to act upon this note and

commence the job, and that was a binding contract between the parties."

Judgment for plaintiff.

FOLGER, J.—We do not think that the jury found, or that the testimony shows that there was any agreement between the parties before the written communication of the defendants of September 30 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be, in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail containing the acceptance. And in general as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance, become such because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that

the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from much be reversed and a new trial ordered, with costs to abide the event of the action.

PRESCOTT v. JONES ET AL.

1898. 69 N. H. 305, 41 Atl. 352.

ASSUMPSIT by Charles W. Prescott against Jones and Perry. Defendants demur to the declaration.

The defendants, as agents of the Manchester Fire Insurance Co., wrote the plaintiff that they would renew his policy on a building for a further term of one year, unless notified to the contrary. The plaintiff did not reply, the defendants did not renew, and the building was destroyed by fire within the year.

BLODGETT, J.—While an offer will not mature into a complete and effectual contract until it is acceded to by the party to whom it is made, and notice thereof, either actual or constructive, given to the maker (Abbott v. Shepard, 48 N. H. 14, 17; Perry v. Insurance Co., 67 N. H. 291, 294, 295, 33 Atl. 731), it must be conceded to be within the power of the maker to prescribe a particular form or mode of acceptance; and, the defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him. But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that "a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it." Clark Cont. 31, 32. "A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract." More v. Insurance Co., 130 N. Y. 537, 547, 29 N. E. 757, 759. And to constitute acceptance "there must be words, written or spoken, or some other overt act." Bish. Cont., § 183, and authorities cited. If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it, merely because he did not communicate his intention not

to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because "it takes two to make a bargain," and, as contracts rest on mutual promises, both parties are bound or neither is bound. The inquiry as to the defendants' liability for the non-performance of their offer thus becomes restricted to the question, did the plaintiff accept the offer so that it became by his action clothed with legal consideration, and perfected with the requisite condition of mutuality? As, in morals, one who creates an expectation in another by a gratuitous promise is doubtless bound to make the expectation good, it is perhaps to be regretted that upon the facts before us we are constrained to answer the question in the negative. While a gratuitous undertaking is binding in honor, it does not create a legal responsibility. Whether wisely and equitably or not, the law requires a consideration for those promises which it will enforce, and, as the plaintiff paid no premium for the policy which the defendants proposed to issue, nor bound himself to pay any, there was no legal consideration for their promise, and the law will not enforce it. Then, again, there was no mutuality between the parties. All the plaintiff did was merely to determine in his own mind that he would accept the offer, for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so, and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract. Nor is there any estoppel against the defendants on the ground that the plaintiff relied upon their letter, and believed they would insure his buildings as therein stated. The letter was a representation only of a present intention or purpose on their part. "It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct. * * * The intent of a party, however positive or fixed, concerning his future action, is necessarily uncertain as to its fulfillment, and must depend on contingencies, and be subject to be changed and modified by subsequent events and circumstances. * * * On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain, and definite fact or state of things, permanent in its nature, and not liable to change. * * * The doctrine of estoppel * * * on the ground that it is contrary to a previous statement of a party, does not apply to such a representation. The reason on which the doctrine rests is that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and alter his condition, to his prejudice, on the faith of such

previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain, and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action." Langdon v. Doud, 10 Allen (Mass.) 433, 436, 437; Jackson v. Allen, 120 Mass. 64, 79; Jorden v. Money, 5 H. L. Cas. 185. "An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." Insurance Co. v. Mowry, 96 U. S. 544, 547. "The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention by the person with whom he is dealing," *id.* 547, 548. See, in addition, White v. Ashton, 51 N. Y. 280; Mason v. Bridge Co., 28 W. Va. 639, 649; Jones v. Parker, 67 Tex. 76, 81, 82, 3 S. W. 222; Bigelow, Estop. (5th ed.) 574. To sum it up in a few words, the case presented is, in its legal aspects, one of a party seeking to reap where he had not sown, and to gather where he had not scattered.

Demurrer sustained.

Conts. If one signs writing which is rightly read under a mistake as to its meaning caused by a third party innocently he is bound.

PHILLIP v. GALLANT.

1875. 62 N. Y. 256.

ACTION on a contract between David Phillip, plaintiff's assignor, and defendant, for the completion of a house by Phillip, for defendant.

CHURCH, CH. J.—The appellant insists that she is not bound by the contract of 22d of February, in respect to completing the building, for the reason that she supposed it contained a provision requiring the plaintiff's assignor to remedy defects which she alleged had occurred in the work done under previous contracts, and that she never agreed to the terms of this contract.

The referee, in his original report, found that the defendant, who does not understand English perfectly, was informed by one Trudo, who was present at the time, that by this new agreement David Phillip was bound to repair the defects she claimed existed in regard to the work already performed, which she believed, but that such statement by Trudo was made without the knowledge or consent of said Phillip or of the person who drew the agreement, and was not heard by either of them; that the agreement was read over twice carefully and distinctly to the defendant; that the same was executed in good faith and without fraud on the part of Phillip, and as he believed, contained the entire agreement between the parties. In a

supplementary report the referee found that Trudo was nominally a clerk in the office of the person who drew the agreement, but that he occupied a separate office and did business for himself, and was not present at the request of the said person; that the defendant was informed that Phillip was only bound to do what he had agreed to do by that agreement; that while it was being read over Trudo explained it to the defendant in French, and told her that all the work would have to be done in a workmanlike manner, including what had been done, and that the defendant believed from Trudo's interpretation that the prior defective work would have to be made good. The referee did not consider the character or quality of work previously done, but held that this contract superseded the prior contracts, and that no claims could be made under them.

It is not claimed that there was a mutual mistake of the parties, so as to lay the foundation for a reformation, but that the defendant is not bound because she believed it obligated the other party to repair defects in previous work. The plaintiff was guilty of no deception in respect to the provisions of the contract; entire good faith on his part, and on the part of Mr. Barnard, who drew the contract, is found. It does not appear from the facts found but that she knew and understood what the provisions of the contract were, and the legal presumption is that she did. It does not appear but that she understood it herself as it was read, and if not, but that Trudo correctly stated the actual provisions of the contract. All that can be claimed from the facts found is, that Trudo construed the contract as imposing an obligation upon Phillip, to repair defects in previous work, and upon his opinion she believed it. The plaintiff was in no sense responsible for his misconstruction; indeed, it must be presumed to have been innocently made by Trudo. She adopted his opinion without calling the attention of the plaintiff to the subject. The point made by the appellant that she never made this contract cannot be sustained. The contract is in writing; it was read to her carefully; she was told that it contained the whole agreement on the subject. It would be a dangerous precedent to hold that under such circumstances a party was not bound. None of the authorities cited justify such a rule. By signing the agreement upon the construction of her adviser, without calling the attention of the other party or the scrivener to such construction, and thus inducing such party to execute the contract upon the supposition that it contained the true agreement, and that the defendant understood and assented to it, and especially as he proceeded to and did perform the contract upon such supposition, the defendant not notifying him of the claim that she construed it differently from what its language imported, she is precluded and foreclosed from insisting that it is not her contract. In the recent case of Smith v. Hughes, L. R. 6 Q. B. 597, cited by the learned counsel for the defendant, Blackburn, J., lays down the correct rule, which is, I think, applicable to this case. He says: "If,

whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

The plaintiff's assignor had every reason to believe that the defendant understood the contract as he did. She acted in a way to induce that belief, and upon that belief thus induced, he executed and performed the contract, and she is bound by it. * * *

Judgment accordingly.

WARNER v. MARSHALL ET AL.

1905. 166 Ind. 88, 75 N. E. 582.

GILLETT, J.— * * * It is one proposition to show the situation of the parties and the circumstances attendant upon the making of a contract, or even their negotiation, in case of ambiguity, and it is quite another proposition to receive the subsequent *ex parte,* self-serving declarations of one of the parties thereto. It has been well stated that "the state of mind or intention of a person, being impalpable, can be ascertained only by means of outward expressions, such as words and acts. Accordingly the law judges of the state of mind or intention of a person by outward expressions only, and excludes all questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning, not only of his words, but of his actions as well; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that agreement is established in law as a fact, whatever may be the real, but unexpressed, state of his mind on the matter." Clarke Contracts 5; Leake Contracts 2. It was said by this court in Henry v. Henry, 11 Ind. 236, 71 Am. Dec. 354, that a contract "may be interpreted by facts existing at the time it is used; but proving existing facts to aid interpretation is a different thing from proving mental intention of parties. The admission of such proof would open a wide door to perjury and fraud, while it is easy for parties, when making a contract in writing, to protect themselves from any wrong by making their contract explicit." See also, 1 Greenl. Ev. 277; 2 Phil. on Ev. (3d ed.) 282; Grant v. Grant, L. R. 5 C. P. 727; 9 Cyc. 578. * * *

§ 2.—Contract in the Broad Sense.

A contract, in the broad sense of the term, is an agreement whereby at least one of the parties acquires a right in relation to some person, thing, act or forbearance.

This may be either

1. A right *in rem*—against all persons indefinitely—as the proprietary right acquired by a deed of conveyance; or,
2. A right *in personam*—against a definite person—as the right acquired by a bond for a deed.

§ 3.—Contract in the Narrow and Proper Sense.

A contract, in the narrow and proper sense, is an agreement whereby at least one of the parties acquires the right to an act or forbearance on the part of the other. The obligation assumed by the other is called a promise.

A contract, in this sense, does not include any agreement whose sole purpose is to confer a present right *in rem.* It always confers some right *in personam,* and the corresponding duty is an obligation to do or not to do a particular thing. It is always executory in its character, and hence is frequently called an executory contract.

Elements of Contract.

The elements essential to the validity and enforcement of a contract are:

1. A communication whereby the parties unite in a common expression of will as to their legal relations; in other words, offer and acceptance.
2. A consideration.
3. A writing, wherever it is required by the statute of frauds.
4. Capacity of the parties to make a contract.
5. Reality of the consent expressed in offer and acceptance.
6. Legality of the object of the contract.

CHAPTER I.

OFFER AND ACCEPTANCE.

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§ 4.—Requisite of offer.

THEISS v. WEISS.

1895. 166 Pa. St. 20, 31 Atl. 63.

ACTION by Peter Theiss against Theodore Weiss to recover for breach of contract to deliver 20,000 barrels of flour at $4 a barrel. At the time the offer was made, defendant actually bought 400 barrels at $4.45 a barrel. Judgment for plaintiff and defendant appeals.

GREEN, J.— * * * The case necessarily had to go to the jury on the main questions of the condition of the defendant at the time he signed the contract in suit, and whether it was a mere bantering proposition, never intended to be carried into execution; and the learned court below fairly and correctly left these questions to the jury. The verdict was against the defendant, and, after reading carefully the whole of the testimony, we feel constrained to say that we regard the verdict as against the weight of the evidence on this latter question. The case, in its circumstances, is very much like the case of Brown v. Finney, 53 Pa. St. 373, which received the condemnation and reversal of this court after a verdict of $2,000 had been recovered in the court below. The defendant in this case, unfortunately and most unwisely, put his name to a written proposition, and, while it is manifest that he did so while considerably under the influence of liquor, it is very plain that he knew perfectly well what he was doing, and that he was not impelled to affix his signature by any act of fraud, deceit, imposition, mistake, or undue influence. On the contrary, his partner, who was present, refused to become a party to such an act of drunken folly, but, after that refusal, the defendant did consciously and knowingly put his name to the paper, with a recklessness and a silly disregard of consequences which, no doubt, he has bitterly regretted ever since. Nevertheless, a calm review of the circumstances indicates clearly, as we think, that the making of the offer to sell 20,000 barrels of flour at $4 a barrel, at the same time when he actually bought 400 barrels, in good business earnest, at

$4.45 a barrel, and the signing of a memorandum in writing of such a sale, were never regarded or intended by either party as more than a mere bluff or banter, without any serious intention that it should be performed as a real, *bona fide* contract. It was perfectly evident, and was abundantly proved, that the defendant, who was a small retail dealer, with limited means, was utterly unable to carry out such a contract, even if the flour could have been obtained in sufficient quantity, and was also unable, without a large advance in the price, to make deliveries at the rate of 400 barrels daily for fifty consecutive days. There is very grave reason to doubt the correctness of the plaintiff's statement that he immediately called upon the defendant to perform the contract, in view of the defendant's positive denial, and, what is more important, the continuance of their ordinary business relations, and the customary purchases by the defendant from the plaintiff of flour at the regular market rates, which were considerably above $4 per barrel. One of the witnesses present, and entirely disinterested, testified that he heard and saw the whole transaction, that the defendant's statement to the plaintiff that he would sell him the flour was made in a bantering, joking way, and that his understanding was that the plaintiff regarded it as a joke. But, of course, all of these things were matters for the consideration of the jury, and it is out of our power to change the verdict, no matter what we may think of the effect of the testimony. * * *

Judgment reversed and new venire awarded.

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§ 5.—**Requisite of acceptance.**

Conts. "would like to accept" is bad.

THURBER v. SMITH.

1903. 25 R. I. 60, 54 Atl. 790.

ACTION by Walter Thurber against Hallis N. Smith. Exceptions to ruling of the district court. Judgment of the district court for the plaintiff in the sum of $32.

STINESS, C. J.—The plaintiff gave a mortgage to the defendant for $200, due March 19, 1902. August 1, 1901, the defendant wrote to the plaintiff as follows: "Providence, R. I., August 1, 1901. Walter Thurber—Dear Sir: Your mtge. calls for interest less than I generally get, and knowing I can let the money out to better advantage if I could get it in, I am willing to allow you $20 discount, if you can raise the money or find somebody else to take it up this month. I have offered this same com. elsewhere, and give you the same opportunity. Very truly, H. N. Smith." The plaintiff replied on the 8th day of August, A. D. 1901, by letter: "I would like to ac-

cept the offer, and expect to have the money for it in about two weeks." August 21, 1901, the defendant notified the plaintiff, by letter, that he had sold the mortgage for its face. * * *

The ruling that the plaintiff's letter was not an acceptance was not excepted to by the defendant, being in his favor, and is not before us on exception. It is proper to add, however, for further proceedings in this case, that we think that this ruling was correct. The letter did not accept the offer expressly or impliedly. The words, "I would like to accept," and "expect to have the money for it in about two weeks," imply a willingness to accept, but a doubt as to ability. Suppose, upon the ground of a completed contract for earlier payment, the defendant had sought to foreclose his mortgage or to sue upon the note. The defendant could have urged with much force that he had not accepted the offer, but had simply expressed a desire to do so. An acceptance of an offer must be definite, unambiguous, and unqualified—such as to complete a contract. In Martin v. Northwestern Co. (C. C.), 22 Fed. 596, an offer of coal upon specified terms was replied to as follows: "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week." This was much more definite than the letter in this case, but it was held that there was no definite contract and acceptance thereof. Brewer, J., said: "It is not 'I accept your offer,' but 'You may consider the coal sold.' It is not, perhaps, a natural expression when a definite acceptance of an offer is intended. It is more equivalent to this: 'There is so little to be settled, and I am so sure that all can be arranged, that you are safe in looking at the sale as closed, and prepare to make your arrangements accordingly.'" In Potts v. Whitehead, 23 N. J. Eq. 512, to an offer to sell land the reply was: "Have twice attempted the tender of the first payment of $500 upon the agreement made between us on the 7th December last, I will meet you," etc., "when I shall be ready to make tender of the money and execute the proper agreements thereupon." It was held that this letter was not, either in terms or substantially, an acceptance of an offer, and concluded no contract. In Myers v. Smith, 48 Barb. (N. Y.) 614, an offer of malt "delivered on boat" was accepted as "deliverable on boat," and it was held that this was not an acceptance of the offer. In Havens v. American Co., 11 Ind. App. 315, 39 N. E. 40, the words, "I am prepared to make the arrangement with you," were held not to be an unqualified and unequivocal acceptance. In Carr v. Duval, 4 Pet. (U. S.) 77, the rule is stated that if it be doubtful whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance. In Hutchinson v. Bowker, 5 M. & W. 535, an offer was made of a quantity of good barley, with terms stated. The reply was: "Of such offer we accept, expecting you will give us fine barley and full weight." The jury found that there was a distinction in the trade between good and fine barley, but that it was not applied in the

letter in that particular sense. The court held that the meaning was ambiguous, and hence no acceptance. See also, Isham v. Therasson, 53 N. J. Eq. 10, 30 Atl. 969; Marschall v. Eisen, 7 Misc. (N. Y.) 674, 28 N. Y. S. 62.

We think the terms of the letter in the case at bar were ambiguous, and so no acceptance, from which it follows that the defendant had the right to revoke his offer, which he did by his notice of sale of the mortgage, and therefore, judgment should have been for the defendant.

Case remitted to the district court, with direction to enter judgment for the defendant.

Cont. Must accept exact terms.

PUTNAM v. GRACE ET AL.

1894. 161 Mass. 237, 37 N. E. 166.

DEFENDANTS sent plaintiff an offer for the unexpired term of a lease, and plaintiff returned an acceptance, subject to the assent of the lessor, which was not obtained.

ALLEN, J.— * * * If the defendants sent to the plaintiff an offer in writing, as a proposal on their part, and the plaintiff returned to them a writing accepting the offer, "subject to obtaining the assent of Mr. Grace, and of the court, if necessary," this was not an unqualified acceptance, but it added a new term, which was a matter of substance, and a real addition. Where an offer is made by one party, and the other annexes a condition to his acceptance, there is no completed contract till the party making the first offer assents to the condition. Till that is done, their minds have not met. In the plaintiff's bill there is no averment that the defendants ever assented to the condition imposed by the plaintiff, and therefore, if the defendants' offer, and the plaintiff's acceptance on condition, were separate transactions, no contract was completed. * * *

Cont.
Can't change implied terms of offer.
Cash = pay at offeror's residence.
Can't change to pay elsewhere.

DE JONGE v. HUNT.

1894. 103 Mich. 94, 61 N. W. 341.

GRANT, J.— * * * In order to complete the contract it was necessary that the plaintiff should write an unqualified acceptance of the defendant's offer. The offer was to sell for $500 cash, net. This meant payment to the defendant at his residence in Iowa. The acceptance requested that defendant send the deed to a party in Grand Rapids, with whom the plaintiff would deposit the money on receipt

of the deed. It became, therefore, necessary for the defendant to write another letter in order to close the transaction. It was to be a cash transaction, and plaintiff's duty was to remit the money, and pay or tender it to him, within a reasonable time after an unqualified acceptance. A response necessitating delay and further correspondence is not an unqualified acceptance. If it had taken weeks instead of days for letters to pass, certainly the defendant would not have been bound to wait, and notify the proposed purchaser that he must send the money to him at his place of residence—a statement already in the offer. * * *

Cents. Difference of payment-bad

WILKIN MFG. CO. v. LUMBER CO.

1892. 94 Mich. 158, 53 N. W. 1045.

THE plaintiff, a manufacturing company, mailed defendant a proposition for the sale of certain mill machinery, with a blank acceptance for defendant to sign and return. Defendant wrote on the margin of the acceptance, "Changed to conform to our letter," and returned it with a letter not accepting the proposition in full, but changing the time and terms of payment. In answer to this the company wired that it had entered the order, but added, "See letter," and sent a letter suggesting different times and terms of payment than proposed by defendant.

LONG, J.— * * * Bishop on Contracts (§§ 321-323) lays down the rule. "If one makes to another an offer, verbal or written, direct by letter or by telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is constituted a mutual consent to the same thing at the same time; in other words, a 'contract.' And the question of the sufficiency of the transaction to work this result is of law for the court. On the other hand, though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations, however slight, in time or otherwise, no contract is made. It is so, for example, where new terms are introduced; they constitute an offer on the other side, and leave the question open." In a note to Eskridge v. Glover, 26 Am. Dec. 349, it is said: "If the acceptance do attach any new condition or fall short of the terms proposed, it is not only insufficient as an acceptance, but is also a rejection of the proposal, and the termination of the liability of the proposer to be bound by a subsequent acceptance conforming to the terms of his proposal." These rules have been frequently applied in this court. Johnson v. Stephenson, 26 Mich. 63; Wardell v. Williams, 62 Mich. 50, 28 N. W. 796; Whiteford v. Hitchcock, 74 Mich. 208, 41 N. W. 898; Bowen v. McCarthy, 85 Mich. 26, 48 N. W. 155.

It is evident from the correspondence that the minds of the parties never met, in the present case, upon the terms of the offer proposed by the plaintiff, or the counter proposition of the defendant. * * *

Conts. Agreement that lease ... terms unsettled is no ... cont. 2nd case.

SHAW v. WOODBURY GLASS WORKS.

1889. 52 N. J. L. 7, 18 Atl. 696.

AN agent of a glass manufactory told a workman that he should have a place in the works the ensuing season. It appeared that there were different places for the workmen, some more valuable than others, and that it was customary for the company before each season to fix the prices to be paid to their employes.

BEASLEY, C. J.— * * * It seems impossible to construe this transaction, as understood by the plaintiff, into a contract of hiring. The essential terms were not settled by the parties to it. The rate of wages was not fixed, nor was the place in the work to be given to the plaintiff agreed upon. In his narration of the affair he said the manager of the defendants' factory "did not say what kind of place I would have, and I have just as good a right to claim a fair place as a poor one." It is evident from this that the plaintiff himself thought that if a poor place had been assigned to him he would not have been bound to take it, and he was right in this conclusion, as, in that respect, he had not stipulated to take any particular position. In Ridgway v. Wharton, 6 H. L. Cas. 304, Lord Wensleydale says: "An agreement, to be finally settled, must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement, upon terms to be afterwards settled between the parties, is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain." Tested by this rule, the present transaction was not a completed bargain, but a negotiation in contemplation of a bargain; for it would be utterly unreasonable to say that in the interview in question the plaintiff undertook to enter the service of the defendant without reference to the situation to be assigned to him, and without reference to the wages to be paid. * * *

Cont. When no cont intended until formal writing, is none.

BOISSEAU v. FULLER ET AL.

1898. 96 Va. 45, 30 S. E. 457.

IN this case an agreement signed by the parties to lease a specified building for a certain time at a stated rental concluded as follows: "The above to be covered by a regular lease subject to approval by all parties."

HARRISON, J.— * * * The whole question is one of intention. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed, and must intend the agreement to be binding. If, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement. Clark Cont., p. 38.

Words of present demise will generally make an actual lease, if no future or more formal document appears to have been intended; and especially if posession is taken under it. But the use of such words, however strong, will not constitute the instrument a lease if it can be clearly inferred from the rest of the paper that the parties had it in contemplation to enter into a future lease. Thus an instrument containing words of present demise, with an agreement that the lessee shall take possession immediately, and that a lease shall be subsequently executed, operates only as an agreement for a lease. Tayl., Landl. & Ten., § 39.

In the case of Winn v. Bull, 7 Ch. Div. 29-32, the court had under consideration an agreement to lease, more formal in its character than the one at bar, closing with these words: "This agreement is made subject to the preparation and approval of a formal contract." Jessel, M. R., said: "It comes, therefore, to this: That where you have a proposal or agreement, made in writing, expressed to be subject to a formal contract being prepared, it means what it says—it is subject to and dependent upon a formal contract being prepared. Where it is not expressly stated to be subject to a formal contract, it becomes a question of construction—whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail. The result is that I must hold that there is no binding contract in this case."

In the case of Harrison v. Parmer, 76 Ala. 157, a similar question to the one at bar was under consideration. A writing had been drawn up, signed by both parties, and duly attested, describing the premises to be let, the commencement and duration of the term, and

the annual rent to be paid, with the addition of these words: "Notes and papers to be drawn up as soon as convenient." Stone, C. J., in delivering the unanimous opinion of the court, held that the paper, without the addition of the words, "Notes and papers to be drawn up as soon as convenient," was sufficient to satisfy the requisitions of the statute of frauds, and to make a binding contract; but that the addition of the words, "Notes and papers to be drawn up as soon as convenient," showed that the parties considered the transaction as incomplete, and held that the writing was only an executory agreement for a lease.

In the light of these authorities, we are of opinion that the language, "The above to be covered by a regular lease, subject to the approval of all parties," with which the writing under consideration concludes, indicates that the "regular lease" to be prepared and approved was in the minds of the parties as the only authoritative evidence of their contract. It alone was to be the consummation of their agreement, and in such a case there is no contract until the formal writing contemplated by the language used has been prepared, approved, and executed, in accordance with the intention of the parties. * * *

Cont. May have sent the later ——
writing intended. GREEN ET AL. v. COLE.
When parties never executed
to writing it would then 1891. 103 Mo. 70, 15 S. W. 317.
subsequent acts may show
assent.

A LAND-OWNER and a real estate agent agreed on the terms of a contract, by which the agent was to have the land laid off into lots, which he was to sell, the proceeds above a stated sum to be divided between the parties, and the agent to have two years in which to make sales. It was understood that the contract was to be in writing. The agent drew up an agreement, which the land-owner read. The agent then suggested making another copy, and that the agreement should then be signed. The owner said he could not wait, but would make a copy, sign it, and send it to the agent. This was on July 27th, and from that time to September 18 there was much correspondence about the naming of the addition and the surveying and platting of the land. On August 14th the owner wrote asking if any lots could be sold that fall. Nothing was said about any agreement until October 5, when the agent spoke of an existing agreement for the sale of the land on the terms stated. The owner did not reply, but sold the land himself, without consulting the agent. Demurrer to the evidence.

BLACK, J.— * * * It is a well-settled principle of law that to constitute a contract the minds of the parties must assent to the same thing in the same sense. There must be a mutual assent to all of the propositions; for so long as any matter forming an element of the

contract is left open the contract is not complete. Though the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done. 1 Add. Cont. (Morgan's Ed.), § 20. On the other hand, it is well-settled law that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing does not negative the existence of a present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given to it from that time, though they intend it shall be superseded by a more formal written agreement. 2 Whart. Cont., § 645; Bonnewell v. Jenkins, 8 Ch. Div. 70; Ridgway v. Wharton, 6 H. L. Cas. 238; Blaney v. Hoke, 14 Ohio St. 292; Montague v. Weil, 30 La. Ann. 50; Mackey v. Mackey's Adm'r, 29 Gratt. (Va.) 158; Bell v. Offutt, 10 Bush. (Ky.) 632. In the recent case, Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869, a written proposal concluded with these words: "If this is agreed to, the agreement can be fully drawn up and signed;" and we held that an acceptance of the proposal would make a binding contract, though no further written agreement was ever drawn up or signed by the parties. We do not regard the case of Eads v. City of Carondelet, 42 Mo. 113, as in conflict with what has been said, for that case proceeds upon the ground that all of the terms of the contract had not been settled, for the mayor was authorized to make a contract with "such further conditions as may be deemed necessary." Enough has been said to show that where parties have assented to all the terms of a parol agreement it does not follow, from the mere fact that a writen contract is to be thereafter prepared and signed, that no binding contract was made. If they intend the parol contract should be binding upon them, then effect will be given to that intention. If there was nothing more in this case than the evidence of what occurred at the office of the plaintiffs when the defendant took the memorandum of a contract and agreed to sign it, we should not disturb a judgment given on a demurrer to the plaintiffs' evidence; for the very fact that defendant did not then sign it is strong evidence that he had not as yet assented to all of its terms. But from the other evidence it appears the parties went on in the execution of some agreement; and, in the absence of any showing to the contrary, the inference is that it was the agreement testified to by the plaintiff. As the evidence tends to show but one agreement, which was acted upon for several months, the conclusion might well be drawn that the parties intended it should be binding from the time the terms were agreed upon. The demurrer to the evidence should have been refused, and it also follows from what has been said that the second instruction is not correct, for it proceeds upon the notion that there could be no contract so long as the parties intended to, but did not, reduce these completed negotiations to writ-

ing. This is an action at law, and it is not our province to say what the finding should be. What we say is that the demurrer to the evidence should have been refused, and, on the evidence before us, the second instruction is incorrect for the reasons before stated. * * *

Cont. Whether in cont before writing is ? of intent. Here in fact no intent to.

MISSISSIPPI & DOMINION STEAMSHIP CO v. SWIFT ET AL.

1894. 86 Me. 248, 29 Atl. 1063.

EMERY, J.— * * * It is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument, and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

Quoted in note W.

In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing, whether it is of such nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract. * * *

We come now to the consideration of the circumstances and correspondence in this case.

The attempt was to negotiate a contract for the use of space on ocean steamers, of which the shippers were to have control to some extent, and in which they were to set up their appliances, and load and care for their own merchandise. This arrangement is quite different from the ordinary contract of affreightment. It is like a charter-party, which is almost universally reduced to formal written draft.

The negotiations contemplated not simply a contract for one area of space on a single steamer for a single trip. The contract was to be for a year, and for different areas of space on three different ships. The interests of the contracting parties in those spaces were so various, and, if not conflicting, yet in such close contact that a contract would need to contain many stipulations in order to sufficiently define the rights and duties of the parties. * * *

The case is by no means free from doubt and difficulty, but due reflection and study of the evidence have at last brought us to the conclusion that what the plaintiff claims to have become a perfected contract on April 5, 1890, by the defendants' letter of that date, was at the most only the acceptance of the proposed basis of a contract, which was yet to be perfected as to details, and put in writing, and that the defendants did not have, nor signify, any intention to be bound until the written draft had been made and signed.

Judgment for defendants.

Cont. Acceptance must follow terms of offer. Dicta as to Counter offer.

DAVENPORT ET AL. v. NEWTON ET AL.

1898. 71 Vt. 11, 42 Atl. 1087.

ACTION by C. H. Davenport and another against Moses Newton and others for trespass on land and for treble damages under statute. There was a judgment *pro forma* for defendants to recover their costs and plaintiffs excepted.

Plaintiffs, by letter, offered to sell all the lumber on his land, whether the title was good or not. Defendant replied, accepting the offer as to part of the land, without referring to the disputed titles.

ROWELL, J.— * * * There is another ground on which it is clear that there is no contract. C. H. Davenport's letter to Sumner offered to sell "the lumber at one dollar per thousand, in the way and on the condition indicated when you were here," referring to a conversation they had had about the matter, which, it is found, "looked to the taking of all the timber upon the lands claimed by the plaintiffs, whether the titles were in controversy or not." The company's reply accepted the offer, as to price, for the spruce and fir on 53 and 54 and on twenty-five acres of lot 51, which were not all the lands claimed by the plaintiffs, but did not refer to disputed titles, and said that the logs were to be cut and delivered according to the specifications of a contract with Sumner for a period of two years, and that payments would be made between the 15th and the 25th of each month for all the stumpage, according to the log scale of the previous month, measured according to Scribner's old log rule. The plaintiffs knew nothing about the contract with Sumner, which was of the

same date as the company's letter, and provided for cutting only spruce and fir on 53 and 54 and said twenty-five acres, to be cut into logs twelve feet and four inches long for twelve feet, and to scale not less than eight inches in diameter at the top. All this, except the price, either fell short of or went beyond the things indicated in the conversation referred to in Davenport's letter, and so the company's letter was no acceptance; for an acceptance, to be good, must be such as to conclude the contract between the parties, and to do that it must in every respect meet and correspond with the offer, neither falling short nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they stand. Potts v. Whitehead, 23 N. J. Eq. 512. An acceptance on terms varying from those proposed is, in effect, a counter proposal, and is not binding until it is itself accepted. Benj. Cont., p. 16. And such counter proposal is a rejection of the offer, and puts an end to the negotiations, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. Minneapolis & St. L. Ry. Co. v. Columbus Rolling Mill Co., 119 U. S. 149; Bank v. Hall, 101 U. S. 43; Benj. Cont., p. 16.

Judgment below modified.

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§ 6.—When offer may be revoked.

Cont. Option w.o. consid can be revoked. Even tho other party has done unto in reliance.

BROWN v. SAN FRANCISCO SAV. UNION.

1901. 134 Cal. 448, 66 Pac. 592.

ACTION by Thomas Brown against the San Francisco Savings Union, to obtain damages from defendant for its alleged breach of an option to sell land. Judgment passed for plaintiff, and from that judgment and from the order denying defendant's motion for a new trial defendant appealed.

HENSHAW, J.— * * * Reading the contract, in the light most favorable to plaintiff, as explained by his testimony—that is to say, that he was not a broker for the sale of the land, but was himself the intending purchaser—the writings amount to this: That the bank, April 21, gave an option to plaintiff to purchase the land, subject to certain expressed terms and conditions, which option he was entitled to exercise at any time before the last day of September of that year. Upon the 12th or 13th day of the May following, while this option had been in force but some 20 days, the bank, for reasons stated, withdrew and rescinded it. By the terms of the option, plaintiff bound himself to nothing. He was free to act under it or not, as

he saw fit. Up to the time of its withdrawal he had given no notice whatever of his acceptance of it. No consideration passed from plaintiff to defendant when the option was tendered. Admittedly, plaintiff paid nothing for the option, and his statements contained in his letter of May 13th, to the effect that he had done considerable work towards effecting a sale of the property, which he is sorry to say cannot be undone, providing the parties live up to the contract between them and him, are representations by his own evidence admittedly false. Even were they true, as no acceptance of the offer had been made known to defendant, defendant would still have had the right to withdraw it, and it is months after the withdrawal was known to plaintiff that he came forward to exercise the option, which, as he correctly states, they had given him "to sell the land," and then upon the trial for the first time it is made to appear that he had from the first intended to purchase it. The option of the defendant was a mere continuing proposal, which it had the absolute right to withdraw before acceptance had been communicated to it. No such acceptance ever was announced until months after the withdrawal. Up to the time of acceptance, a contract such as this, where no consideration has been parted with, no binding obligation of any kind entered into, is mere *nudum pactum*. The authorities on this point are so numerous, the law upon it so well settled, that it is almost superarogation to refer to them.

For the foregoing reasons, the judgment and order are reversed and the cause remanded.

Eq. Cont. Option under seal. No consid. Held no relief in Eq. as Eq. will not enforce sealed Cont. w.o. consid.

CRANDALL v. WILLIG ET AL.

1897. 166 Ill. 233, 46 N. E. 755.

APPELLANT, Crandall, as assignee of De La Moine Wickersham, filed a bill for specific performance of an agreement by the appellees to convey property, at the option of Wickersham, at a certain price and within a designated period. Bill dismissed. Appealed.

CARTER, J.— * * * The contract in the case at bar was a mere option given by the Willigs to Wickersham to purchase the land in question within the time mentioned, and there was, before its acceptance, no consideration to support the contract. It was, therefore, within the power of the Willigs to withdraw this option at any time before their offer to sell was accepted. True, the contract was under seal, and purported to be based upon the nominal consideration of one dollar; but the evidence showed that there was in fact no consideration whatever, and it is well settled that in equity the real consideration may be inquired into, and the parties are not concluded by the recitals in the contract, though under seal. "Equity," says Mr.

Pomeroy, "will never enforce an executory agreement unless there was an actual valuable consideration, and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms and looking at the reality, it requires an actual, valuable consideration as essential in any such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements and executory contracts of every description." 3 Pomeroy's Eq. Jur. § 1293.

It is clearly proved in this case that after the expiration of one year—the period which the Willigs claimed they understood the contract was to run—and before its acceptance by Wickersham, the Willigs refused to perform, but declared it to be at an end, and so notified Wickersham. After they had repudiated it and declared to him that they would never perform it, he sent them his written acceptance, to which they paid no attention, and still later he assigned the contract to appellant.. When, therefore, appellant received the contract it had no binding force. It could not have been enforced by Wickersham, and Crandall was in no better position than he. * * *

Decree affirmed.

Eq. Lease & option to lessee to buy.
Held Eq. will spec. enforce as to
under seal, also on
Sid. in other part of
lease.

HAYES v. O'BRIEN ET AL.

1894. 149 Ill. 403, 37 N. E. 73.

A LEASE for a term of ten years reserved to the lessor the right to sell the demised premises at any time after date, and then provided: "But no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms and at the same price per acre as any other person or purchaser might have offered therefor." The lessor made sale of the premises without notice to the lessee, who, upon learning the fact, offered to pay the price at which the lessor sold the same, and demanded of the lessor and his purchaser a conveyance of the land.

Bill by lessee for specific performance. Demurrer. Bill dismissed. Appeal.

SHOPE, J.—* * * The doctrine of the earlier English and American cases, in which it was held that the want of mutuality of obligation and remedy would render the contract incapable of specific enforcement, has, by the more modern cases, been so modified that optional agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced, in equity, if made upon sufficient and valuable consideration. And so, where the agreement to convey is a part of a lease or other contract between the parties, for which the agreement to convey forms

the true consideration, the want of mutuality will not avoid the contract. Estes v. Furlong, 59 Ill. 298; Hawralty v. Warren, 18 N. J. Eq. 124; Hall v. Center, 40 Cal. 63; Maughlin v. Perry, 35 Md. 352; Backhouse v. Mohun, 3 Johns. (N. Y.) 434; Clarson v. Bailey, 14 id. 484; Willard v. Tayloe, 8 Wall. (U. S.) 557, and cases cited.

In Willard v. Tayloe, *supra*, it was covenanted in the lease executed between the parties, that the lessee should, at any time before the expiration of the lease, have the right to purchase the leased premises at a fixed price, and it was said: "The covenant in the lease giving the right or option to purchase the premises, was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal, must be regarded as made upon a sufficient consideration, and therefore, one from which the defendant was not at liberty to recede." When the contract is unilateral, as in the case of an option to purchase, the court will, as said in Estes v. Furlong, *supra*, exercise its discretion with great care, and scan the conduct of the party claiming the benefit of such a contract. "But an agreement of this character cannot be regarded as invalid, or as one which will not be enforced in equity." In Hawralty v. Warren, *supra*, it is said: "In taking the lease, a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price, and it is not to be presumed that the landlord would agree to such a concession unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity."

We need not further review the authorities. The contract here is under seal and imports consideration, but if it was not, it is manifest that the privilege of becoming a purchaser of the premises formed at least a part of the inducement and consideration for the acceptance of the lease by the lessee. There is practical uniformity in the authorities, that where the contract is otherwise valid, is fairly entered into, and is upon sufficient consideration, equity will enforce it, where there has been an acceptance of its terms by the vendee in apt time. Such a contract is a continuing obligation on the part of the lessor, running with the lease, which the lessee may accept, at his option, within the time limited. It is alleged in the bill that the sale was made by Thomas to O'Brien without notice to the lessee, and that immediately upon learning the same, the lessee offered, and was and still is ready and willing, and offers by his bill, to take the land at the price at which it was sold, and that he demanded of Thompson and O'Brien conveyance of the land according to the agreement. This was all he could or was required to do. Estes v. Furlong, and other cases *supra*. * * *

Decree reversed and cause remanded for further proceedings.

Cont. Prom. to take all one needs in bus. is good. Consid.

NAT. FURNACE CO. v. KEYSTONE MFG. CO.

1884. 110 Ill. 427.

CRAIG, J.— * * * The undertaking, here, was substantially this: Appellant agreed to deliver in car, at Sterling, Illinois, all the iron that appellee needed in its business during the then ensuing year, at $22.35 per ton. Appellee, on its part, agreed to take its year's supply of iron of appellant, and pay for the same $22.35 per ton. We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron, but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year—that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual. A foundry may purchase its supply of coal for the season of the coal dealer. A hotel may do the same. A city, for the use of the public schools, may engage its supply of coal for the winter, at a specified price. Such contracts are not uncommon, and we have never understood that they were void. Smith v. Morse, 20 La. Ann. 220, is a case in point. In this case Smith agreed to furnish Morse all the ice he might require for the use of his hotel for five years, at a certain price. Smith undertook to avoid the contract, on the ground that Morse was not bound, but the court held the contract valid and binding on both parties. * * *

Cont. Continuing offer + acceptance before revocation. Held no cont. because prom to take all you want is N.Y. overruled fact that or to part ordered Higbie was bound.

HIGBIE v. RUST.

1904. 211 Ill. 333, 71 N. E. 1010.

J. P. RUST, the manufacturer of five-pound jelly pails, at Keene, N. H., offered to furnish to Fred K. Higbie, at Chicago, all the pails which he might want for his trade at a price named. Rust furnished pails for a while, and then, upon receiving an order for another lot, wrote Higbie that he had advanced the price of the pails 25 per cent.

Higbie thereupon directed Rust, by letter, to ship him the lot ordered, but the latter refused, and brought suit for balance due on previous shipments. Higbie filed a plea of the general issue and notice of set-off, claiming that there was a completed contract between the parties with reference to the last order, and that he had suffered damages by reason of Rust's breach of the contract, in failing and refusing to ship the pails. Rust recovered a judgment against Higbie in the trial court which was affirmed by the appellate court. Higbie brought the record to the supreme court by writ of error.

SCOTT, J.— * * * Higbie contends that the conversation at Keene and the letter received by him from Rust, dated August 7, 1899, together with the course of dealing between the parties shows, or tends to show, the existence of a contract between them, whereby Rust was obligated to furnish to Higbie all the five-pound jelly pails which the latter might want for his trade at the price named until notified by Rust that he would no longer furnish pails at that price, and that as the last 3,500 dozen were originally ordered before the advance in price, Rust was obliged to furnish them at the former price. It will be observed that both by the conversation at Keen and the letter relied upon, Rust stated that he would furnish all the pails that Higbie "wanted." If it be conceded that the latter accepted this proposition, we think the contract cannot be enforced, for the reason that it is lacking in mutuality. By its terms Rust would be obliged to sell, but Higbie would not be obliged to buy. The fact that Higbie was an extensive dealer in pails, supplying many customers, does not alter the situation. He might elect to sell no five-pound jelly pails whatever, or to purchase all he should sell from some person other than Rust. There was no agreement on Higbie's part to take or want such pails as he might sell to his trade, or to take or want any pails whatever.

Where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined whether he will want any of the commodity or what quantity he will want, the contract is void for lack of mutuality. Hoffman v. Maffioli, 104 Wis. 630; Bailey v. Austrian, 19 Minn. 535; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

Plaintiff in error regards the case last cited as supporting his position. In that case, the Keystone Manufacturing Company was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its affairs, and contracted for all the iron, at a fixed price, which it would need in its business during the ensuing year, and the National Furnace Company agreed to furnish the same at that price. In that case, there was something by which to measure the needs of the purchaser and fix the amount of

the commodity to be delivered under the contract viz.: such quantity as should be needed during the year in the manufacturing business which the purchaser was then conducting and in which it was certain some quantity would be needed. Here there is no method to determine what quantity, if any, the purchaser would want, as his wants would be measured by his sales, and so far as Rust was concerned, would only exist if he, Higbie, was unable to purchase elsewhere at a better price. * * *

Judgment affirmed.

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§ 7.—How offer may lapse.

Cont. Offer expired by lapse of time set in it.

RICHARDSON v. HARDWICK.

1882. 106 U. S. 252.

WOODS, J.—This was a bill in equity filed by Richardson, the appellant, to compel the specific performance of a contract relating to lands between him and Hardwick, the appellee.

The contract opened with a description of the lands to which it related, and then proceeded as follows:

"The above described lands have been purchased by me under an arrangement with Arthur R. Richardson, as follows: It is understood that said Richardson may become equally interested in the above lands by paying to me one-half the purchase price of the lands, together with an equal share of all expenditures made by me for taxes or any other purpose, and also ten per cent. interest on all capital furnished by me in connection with his half interest. It is further understood that the purchase price of the lands bought of T. H. Eaton is to be reckoned at $10 per acre, and the terms of the above agreement are limited to two years from this date. Said Richardson is to pay one-half his share in one year, and the balance in two years. * * *"

Looking at the contract as reduced to writing by the parties, we are clear that Richardson is not entitled to the relief prayed for by his bill.

The written contract gives him the privilege, or, as counsel call it, an "option," to become equally interested in the lands by paying one-half of the purchase money, etc., within two years after its date. The contract, of itself, did not vest him with any interest or estate in the lands. It merely pointed out the mode in which he might acquire an interest, namely: by paying a certain sum of money within a certain time. He did not pay the money within the time limited by the contract, and has never paid it or any part of it, and eighteen months before the commencement of this suit, Hardwick gave him

notice that his option to purchase had been lost, and told him that he had no interest in the lands.

It is clear from the terms of the contract that Richardson was not bound by it. He did not agree to purchase any share in the lands or to pay Hardwick any money. The contract gave Hardwick no cause of action against Richardson. The latter was not bound to become interested in the lands, or to pay any money thereon, unless he chose to do so.

In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound. Jones v. Robinson, 17 L. J. Exch. 36; Mills v. Blackall, 11 Q. B. 358; Morton v. Burn, 7 Ad. & El. 23; Kennaway v. Treleavan, 5 Mees. & W. 501.

In this case, Richardson having failed to pay the money or any part of it within the time limited, the privilege accorded him by the contract was at an end, and all the rights under it ceased.

The decree of the circuit court dismissing the bill was, therefore, right, and must be affirmed.

MACLAY v. HARVEY.

1878. 90 Ill. 525.

THE defendant sent by letter an offer to engage the plaintiff as a trimmer in his millinery shop at Monmouth, Ill., asking an "answer by return mail," which letter was received by the plaintiff on the 22d day of March, which she answered by postal card on the next day, accepting the offer, and which, if then mailed, would have reached the defendant on the 24th, but which she gave to a boy to mail, who neglected to mail it until the 25th. Action of assumpsit on alleged contract. Judgment for defendant. Appeal.

SCHOLFIELD, J.— * * * Appellee receiving no reply from appellant, on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received appellant's postal card, which had come to the office there during his absence. On Wednesday night, of the same week, appellee left Monmouth for Chicago, arriving at the last named place on the following morning, Thursday, March 30. Finding that appellant was neither at Keith Bros., nor at Wetherell's, he proceeded to employ another milliner, and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact, but this letter, in consequence of appellant's absence from Peoria, she did not receive for some time afterwards.

The millinery season commences from the 5th to the 10th of April and ends from the 20th of June to the 4th of July, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of the 30th of March. Appellant says she left Peoria for Chicago on Friday, which must have been the 31st of March. On arriving in Chicago, she went to Wetherell's and, failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and on the 8th of April she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming," and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's post card on the 25th of March. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. Hough v. Brown, 19 N. Y. (5 Smith) 111.

It was said by the lord chancellor, in Dunlop v. Higgins, 1st House of Lord's cases, at page 387: "Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here, that the nature of the business demanded a prompt answer, and the words "you will confer a favor by giving me your answer by return mail," do, in affect "stipulate" for an answer by return mail. Taylor v. Rennie, *et al.*, 35 Barb. (N. Y.) 272.

The evidence shows that there were two daily mails between Peoria and Monmouth—one arriving at Monmouth at 11 o'clock A. M., and the other at 6 o'clock P. M., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offer, it will be remembered, bears date March 21. Assuming the date of appellant's postal card (which, she says, was written on the morning after she received appellee's letter) to be correct, she

received appellant's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or, at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence.

The question of whether it would not have equally well subserved appellee's object had he treated the postal card of appellant as the consummation of a contract, is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is, therefore, incumbent on her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was, thereafter, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led, by the postal card of appellant, to believe that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or Keith Bros. Had he done so it was his intention to treat the contract as closed; but she was not there, and this intention was not acted upon, and so is to be considered as if it had never existed. Appellee, not finding appellant at Wetherell's or Keith Bros., as she had led him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot, therefore, be held estopped from denying that it was not posted in time. In view of the lateness of the season, and the danger to appellee's business from delay, of all which appellant was aware, it cannot be said appellee acted with undue haste in engaging another milliner.

Judgment affirmed.

LARMON v. JORDAN.

1870. 56 Ill. 204.

THIS was a bill filed by appellee against appellant and Tooke, in the superior court of Chicago, on the 3d day of August, 1869, to remove a cloud upon the title of appellee's land.

Bill alleges appellee's seizin in fee simple; that on the 22d of January, 1869, Tooke, representing that he was agent of the Rock River College Association, and as such being about to purchase lands in the vicinity of those in question, obtained from appellee a proposition for sale of his lands as follows:

"CHICAGO, January 22, 1869.

"I will sell to M. M. Tooke, Supt. Rock River College Association, the W. ½ of S. E. ¼ of section 21, 38, 14, south of R. I. Junction, for $500 per acre, ¼ cash, balance 1, 2 and 3 years, with interest 8 per cent. I further agree to wait until May 1, 1869, for first payment by purchaser giving bond with approved security for payment with interest 8 per cent. as above. T. M. JORDAN."

On the 18th of February Tooke wrote under this proposal: "The above proposal accepted, and notice given February 18, 1869." Afterward, on the 26th of March, Tooke caused the proposal and acceptance to be recorded in the recorder's office of Cook county, wherein the land was situated.

Tooke then assigned the contract to appellant, who had notice of the premises. Decree in favor of appellee. Appeal.

MCALLISTER, J.—The instrument of the 22d of January, 1869, was but a simple proposition for a sale, without consideration, and not under seal.

If the proposer had limited the time for acceptance, as in the case of The Boston & Maine Railroad v. Bartlett, 3 Cush. (Mass.) 224, relied upon by appellant's counsel, still by that, as well as the general current of authorities, he would be at liberty to withdraw the offer at any time before acceptance, and, if not accepted within the time limited, he would not be bound unless he assented in his turn. Here no time was limited. The law therefore fixes a reasonable term, to be determined by the circumstances of the case.

"If the proposer fixes a time, he expresses his intention, and the other party knows precisely what it is. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have had in mind." 1 Pars. on Cont. 405, 406.

Appellee testified, that some seven or eight days after he made the proposition in question, Tooke called on and requested him to take

stock in the college enterprise to the amount of $10,000; that he declined taking it, whereupon Tooke said that he had not received the encouragement to which he was entitled, from those owning property in that vicinity, and that he would abandon the whole project, and, as appellee says, to use Tooke's own words, "let it go by the board." That appellee replied that he was sorry he did not receive such encouragement, but that he, appellee, could not help it, and that that would end the matter between them, and in this respect appellee is corroboratd by the evidence of two other witnesses. Tooke, in his evidence, admits having the interview at that time, and states that he said he had not received the encouragement that he expected in the sale of the stock and that he might have to give it up, "meaning," as he says, "the stock plan of the college," but he denies that he said that he would abandon the purchase of the land.

On cross-examination, he gives the language used by him on that occasion: "I said that I had not received the encouragement I had expected in regard to the sale of stock, and I did not know but that I would have to give it up." He does not deny that appellee thereupon said, that that should end the matter between them; but says he did not hear it, which is but the negative evidence of one witness standing against the affirmative statements of three. If appellee revoked the offer before acceptance within a reasonable time, it is immaterial whether Tooke abandoned the purchase or not. The right of revocation did not depend upon his acquiescence.

No acceptance at the time in question, or at any time anterior to the acceptance supposed by the act of writing one on the paper, February 18, 1869, is pretended. If appellee did, in fact, declare a revocation of the offer on the 30th of January, as he claims, and on the 1st of February thereafter dealt with the property in a manner inconsistent with a willingness to continue the offer, then the presumption that the *aggregatio mentium* necessary to a contract herein occurred, is countervailed by the evidence.

But, disregarding that evidence entirely, then how does the case stand? When the time is limited, by the offer, during which it is to continue, then, if without any previous revocation the offer is accepted, the presumption of a meeting of minds would be conclusive, simply because the offer is presumed to have been renewed during every moment of the time limited, which signifies the assent of the vendor and the acceptance that of the vendee. So, if no time be limited, the offer, in the absence of evidence to the contrary will be presumed to have been renewed every moment during a reasonable time and no longer. If, therefore, there be no acceptance within a reasonable time, there can be no presumption of a meeting of minds, because there can be none of a continuance of the offer to the time of acceptance.

At the time the proposition was made, circumstances existed, and were known to both parties, which made the property offered pe-

culiarly liable to fluctuation in value. It is not rational to suppose that men of ordinary understanding and prudence would contemplate the continuance of an offer of this kind, under the circumstances of this transaction, for so long a period as twenty-seven days. Indeed, the clear preponderance of the evidence is, that Tooke endeavored to get an extension of it for ten days, but appellee refused to give it.

Though the question as to what is a reasonable time for the continuance of such an offer may often be a difficult one to determine, yet we are satisfied that, under the circumstances here, it was not within the contemplation of the parties that the offer should continue for so long a period as elapsed before the supposed acceptance. It follows from this view that even disregarding the evidence of revocation there was no offer pending at the time of the supposed acceptance, and, therefore, there is no presumption of a meeting of the minds of the parties requisite to a contract. No action at law could be maintained upon it, nor would a court of equity compel specific performance of it as a contract.

Still, there can be no question but the instrument as it stands upon record, constitutes a cloud upon appellee's title, and there is as little doubt that it was placed there in violation of a pledge to the contrary, and in fraud of appellee's rights. The jurisdiction of chancery in the premises is clear. The decree of the court below is fully supported by the evidence, and must, therefore, be affirmed.

Decree affirmed.

ELIASON ET AL. v. HENSHAW.

1819. 4 Wheat. (U. S.) 225.

WASHINGTON, J.—This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of

the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distance about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day was written by the defendant addressed to the plaintiffs at Georgetown, and despatch by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at $9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add, "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiff's first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury that, if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of $9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for. If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have re-

ceived the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was despatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in traveling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer, and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstances of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded, with direction to award a venire *facias de novo*.

PRATT, ADMX. v. TRUSTEES.

1879. 93 Ill. 475.

APPELLEES obtained judgment against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes executed by the deceased to the appellees.

SCHOLFIELD, J.— * * * The question to be considered is, did Prattt's death revoke the promise expressed in the notes, no money having been expended, or labor bestowed, or liability of any kind incurred, prior to his death, upon the faith of that promise?

The purpose in giving the notes was to enable the church represented by appellees to purchase a bell. The cost of a bell of a particular size, etc., was estimated by Pratt, and he gave his notes for the amount of the estimate, intending that when the notes were paid the money should be devoted to paying for such a bell, and when the notes matured, at Pratt's suggestion to let them stand, because, as he alleged, bell metal was getting cheaper, and they would thereby be enabled to procure a larger bell, no effort was made to collect the notes, and they were permitted to remain just as they were; but there was no undertaking on the part of appellees, nor the church which they represent, to procure a bell, and there is no proof of any act done, or liability incurred by appellees, or any one else, in reliance upon those notes, before the death of Pratt. It is shown that a bell has been procured, and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's lifetime, the record unfortunately does not show it. Collection of the notes cannot be enforced as a promise to make a gift. Pope v. Dodson, 58 Ill. 360; Blanchard v. Williamson, 70 *id.* 652.

Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defense of a want of consideration, unless money has been expended, or liabilities incurred which, by a legal necessity, must cause loss or injury to the person so expending money, or incurring liability, if the notes are not paid. Parsons on Bills and Notes, Vol. 1, p. 202; 1 Pars. on Conts. 377, *et seq.*

And so it has been held that the payee of a promissory note given to him in the expectation of his performing service, but without any contract binding him to serve, cannot maintain an action upon it. Hulse v. Hulse, 17 C. B. 711 (84 Eng. Com. Law 709).

In the absence of any one claiming rights as a *bona fide* assignee before maturity, it is not perceived that promissory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay

so much in aid of a church, school, etc., where there is no corresponding undertaking by the payee.

The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. McClure v. Wilson, 43 Ill. 356, and cases there cited; Trustees v. Garvey, 53 *id.* 401; Baptist Educational Soc. v. Carter, 72 *id.* 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer, until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

If the payees named in the notes may be held agents of the promisor, with power to contract for work to be done and money expended upon the faith of the notes, the case of Campinari v. Woodburn, 15 C. B. 400 (80 Eng. Com. Law 400), is directly in point, and holds that the death of the promisor was a revocation of the agency. In that case the plaintiff alleged that it was agreed between him and the defendant's intestate that he should endeavor to sell a certain picture, and that if he succeeded the intestate should pay him £100; that he did so endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that the defendant had refused to pay £100. The count was held not to show a cause of action. Jervis, C. J., said that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. A *fortiori* the defendant was not responsible when the revocation proceeded from the act of God.

An analogous case is The Michigan State Bank v. Leavenworth, 2 Williams (Vt.) 209, where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death.

The question that has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

We are of opinion, on the record before us, the judgment below

was unauthorized. It must therefore be reversed and the cause remanded.

Judgment reversed.

BEACH ET AL. v. FIRST M. E. CHURCH.

1880. 96 Ill. 177.

THIS was an action upon a subscription of $2,000 toward the erection of a church on condition that $8,000 in addition be subscribed.

DICKEY, C. J.— * * * The subscription made by Doctor Beach, was, in its nature, a mere offer to pay that amount of money to the church upon the condition therein expressed.

There is nothing in the record tending to show that the church, in this case, took any action upon the faith of this subscription until after Doctor Beach was adjudged insane, or that the church paid money, or incurred any liability. His insanity, by operation of law, was a revocation of the offer. In Pratt, Administratrix, etc., v. The Trustees of the Baptist Society of Elgin, 93 Ill. 475, this court said, in relation to such a subscription: "The promise, in such case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until acted upon, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death of the promisor, before the offer is acted upon, is a revocation of the offer. * * * The continuance of an offer is in the nature of its constant repetition, which, of course, necessarily requires some one capable of making a repetition. Obviously, this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man."

The ground upon which the court rested its judgment in the Pratt case, was the want of capacity on the part of the promisor to continue his promise or offer. The insanity of Doctor Beach rendered him, in law, as incapable of making a contract, or of continuing or repeating an offer to the church as if he had been actually dead. * * *

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§ 8.—Communication by Mail or Telegraph.

TAYLOE v. MERCHANTS' FIRE INS. CO.

1850. 9 How. (U. S.) 390.

NELSON, J.— * * * This is an appeal from a decree of the circuit court for the district of Maryland, which was rendered for the defendants.

The case in the court below was this: William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that state, for an insurance upon his dwelling-house to the amount of $8,000 for one year, and, as he was about leaving home for the state of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the state of Alabama on business, and would not return till February following, and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding: "Should you desire to effect the insurance, send me your check, payable to my order, for $57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe until the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the meantime, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent; and refused to issue the policy, or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

1. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn, proposed by the applicant to the company for their approval or rejection. For, if the

contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view, in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st of December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes: "Should you desire to effect the above insurance, send me your check, payable to my order, for $57, and the business is concluded"; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of Adams v. Linsdell (1 Barn. & Ald. 681), and Mactier's Adm'rs v. Frith (6 Wend. (N. Y.) 104), are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance. * * *

Decree reversed.

BRAUER ET AL. v. SHAW ET AL.

1897. 168 Mass. 198, 46 N. E. 617.

ACTION by William W. Brauer and others against Frank Shaw and others for breach of contract for cattle space in a steamship. Verdict for defendants. Plaintiffs except.

HOLMES, J.—* * * At half-past 11 the defendants tele-

graphed, "Subject prompt reply, will let you May space, fifty-two six." This was received in New York at 16 minutes past 12, and at 28 minutes past 12 a reply was sent accepting the offer. For some reason this was not received by the defendants until 20 minutes past 1. At 1 the defendants telegraphed, revoking their offer, the message being received in New York at 43 minutes past 1. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and, at least, it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If, then, the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it has been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer, and to offer, are the same thing. O'Donnell v. Clinton, 145 Mass. 461, 463, 14 N. E. 747; Cornish v. Abington, 4 Hurl. & N. 549. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if, by its express or implied terms, it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer, and the act relied on a step looking to, but not yet giving, notice. The contrary suggestion by Wilde, J., in McCulloch v. Insurance Co., 1 Pick. (Mass.) 278, 279, is not adopted as a ground of decision, and the view which we take is that taken by the supreme court of the United States, and is now the settled law of England. Tayloe v. Insurance Co., 9 How. (U. S.) 390, 400; Patrick v. Bowman, 149 U. S. 411, 424; Byrne v. Van Tienhoven, 5 C. P. Div. 344; Stevenson v. McLean, 5 Q. B. Div. 346; Hawthorne v. Fraser (1892), 2 Ch. 27; Thomson v. James, 18 Scot. Sess. Cas. (2d Sess.) 1; Langd. Cas. Cont., p. 125; Drew v. Nunn, 4 Q. B. Div. 661, 667;

Wheat v. Cross, 31 Md. 99, 103; Kempner v. Cohn, 47 Ark. 519, 527, 1 S. W. 869.

Exceptions sustained.

HAAS v. MYERS ET AL.

1884. 111 Ill. 421.

BILL in equity by Andrew Haas to have himself declared a partner with Alfred Myers in respect to a certain lot of cattle and for an accounting.

Myers and Haas contemplated making a large purchase of cattle in the west, and it was agreed that Myers should go to see the cattle, and telegraph back to Haas the price per head if a purchase was made, when Haas was to reply by telegraph, without delay, saying "yes," if he was willing to take a third interest in the purchase, and then Myers was to telegraph back to Haas the estimated amount required to pay a third interest, which Haas was to place to the credit of Myers and his brother, in a Chicago bank, so that the latter might draw on the same, and cause the bank to telegraph that fact to Myers. Myers bought the cattle for $55,000, and telegraphed Haas the price per head, and he answered "yes," which dispatch never reached Myers. Later, Haas sent another dispatch to Myers, saying if the cattle were good there was no danger in buying them, which was received on the same day that Myers and another had concluded the purchase by paying the necessary advance. On the next day Haas arrived, and offered to pay his share of the price, which was declined.

SHELDON, J.—It is insisted upon the part of the appellant that the partnership here claimed was actually formed; that if there was not a literal there was a substantial performance by Haas of the conditions of the contract, that he did all that he could—telegraphed, as he had agreed, his acceptance—and could do no more until action by Myers; that not putting up his share of the money in the manner provided, was because of the failure of Myers to advise him by telegram of the amount necessary; that the telegraphic acceptance sent by Haas, although not received, had all the legal effect it could have had if it had been received by Myers. In support of this last proposition the rule governing the negotiation of contracts by correspondence through the mail is appealed to, and it is contended the same rule applies in the negotiation of a contract by telegraph—that rule being, that where parties undertake to contract by letter, and one party makes a proposal by letter, and the other by letter accepts and posts his acceptance, the minds of the parties have met, and from the instant of mailing the acceptance the contract is a valid and bind-

ing one. See Household Fire Ins. Co. v. Grant, L. R. 4 Exch. Div. 216; Taylor v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390; Mactier v. Frith, 6 Wend. (N. Y.) 103; Hallock v. Insurance Co., 2 Dutch. (N. J.) 268; Minnesota Oil Co. v. Collier Lead Co., 4 Dill. (U. S.) 431; Abbott v. Shepard, 48 N. H. 14; Trevor v. Wood, 36 N. Y. 307; Pomeroy on Contracts, 95, and cases there cited. Although there be contrary authority that a contract made by mutual letters is not complete until the letter accepting the offer has been received by the person making the offer (see Lewis v. Browning, 130 Mass. 175), we regard the weight of authority to be in favor of the rule as first above stated. A distinction has been taken, that though in general such a contract takes effect from the time of acceptance, and not from the subsequent notification of it, yet the offerer may not be bound by the fact that the letter of acceptance had been put in the post-office, if the letter never reached its destination. The preponderance of authority does not appear to sustain this distinction, but to hold that the mailing of the letter of acceptance completes the contract, whether the letter reaches its destination or not. In the above cases, in 4 Dill. (U. S.) and 36 N. Y., it was held that the same rule applied in the case of correspondence by telegraph as in the case of correspondence through the mail. Whether the rule does so fully apply in the former case we do not find it necessary now to determine, as, conceding that it does, we do not consider that the rule has application to the facts of the present case. We think that under the arrangement entered into between the parties, the formation of the contract was made dependent upon the actual communictaion by telegraph, to Myers, of Haas' acceptance. This is not the case of an offer made, and where the simple acceptance completes the contract between the parties. Haas' reply, if it had reached Myers, was not the conclusion of the bargain. Considerable remained to be done afterward, on both sides. Myers, after receipt of the dispatch, was to telegraph again, giving the amount to be deposited. Haas was to deposit this amount. The bank was then to telegraph the credit to Myers, so as to make it available for the purchase of the cattle. * * *

PEARCE v. LANGFIT.

1882. 101 Pa. St. 507.

GREEN, J.—We think the delivery of a letter to an official letter carrier is the full equivalent for depositing it in a receiving box or at the post-office. When left in the former it is for the purpose of being taken therefrom by the carrier, and if left at the post-office it

must be taken from the receptacle there provided for its deposit, either by the postmaster or by some one of his agents, to be placed in the mail. In either case the letter must come into the personal custody of some one lawfully authorized for the purpose, whose function it is to participate in the transmission of it from the sender to the mail.

It certainly can make no difference whether the letter is handed directly to the carrier, or is first deposited in a receiving box and taken from thence by the same carrier. In the case of Skilbeck v. Garbett, 7 Ad. & El. (N. S.), p. 846, in which the very point was decided, Lord Denman, C. J., said: "If a public servant belonging to the post-office, takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office." The postal regulations of the United States require that carriers while on their rounds shall receive all letters prepaid that may be handed to them for mailing. It follows that when such a carrier receives a prepaid letter from a citizen for the purpose of being mailed, he is in the strict performance of his official duty. * * *

Application for policy. Policy sent to Co's agent. Held no acceptance as parties really face to face (Co's agent & applicant). In such case actual communication is necessary. Exception may when ... a dis'ance.

BUSHER v. N. Y. LIFE INS. CO.

1904. 72 N. H. 551, 58 Atl. 41.

IN this case the agent of defendants forwarded to the company a written application of the plaintiff's husband for a policy of insurance on his life, payable in case of death to the plaintiff. A policy was written out in accordance with the terms of the application and sent to the agent for delivery with directions to collect the premium and remit the same. The agent received the policy about 7 o'clock in the forenoon. The applicant died about 4 o'clock that morning.

BINGHAM, J.—The plaintiff brings this suit to recover the amount specified in a policy of insurance which she alleges the defendants issued or agreed to issue, on the life of her husband for her benefit. The contract, if consummated, was bilateral in its nature, and involved mutual promises. To establish a contract of this character, when the parties are at the same place, there must be, according to the principles of the common law, an offer and an acceptance thereof in accordance with its terms; and the acceptance, to be complete, must be actually communicated to the offerer. Beckwith v. Cheever, 21 N. H. 41, 43; Perry v. Insurance Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. 668; Prescott v. Jones, 69 N. H. 305, 41 Atl. 352; Thompson v. Jones, 18 Dunlop 1; 1 Lang. Cont. 125; Vassar v. Camp, 11 N. Y. 441; Hebb's Case, L. R. 4 Eq. 9; 1 Lang. Cont. 156, 162; 2 Lang. Cont. 993, § 14, 9 Cyc. 270-273. 2.

An exception, however, is recognized when the parties to such a contract are at a distance from one another, and the offer is sent by mail or by telegraph, in which case it is commonly held—and such is the law of this state—that the reply accepting the offer may be sent through the same medium, and the contract will be complete when the acceptance is mailed or delivered at the telegraph office, properly addressed to the party making the offer, and beyond the acceptor's control. Abbott v. Shepard, 48 N. H. 14; Davis v. Insurance Co., 67 N. H. 218, 34 Atl. 464. The theory advanced in support of such a holding is that when one makes an offer through the mail, or like agency, he authorizes the acceptance to be made through the same medium, and constitutes that medium his agent to receive the acceptance, and that the acceptance, when mailed or delivered at the telegraph office, is then constructively communicated to the offerer. 2 Lang. Cont. 995, § 15, par. 2. While constructive notice of acceptance is permitted to take the place of actual communication in such cases, still the law requires that the message of acceptance shall pass beyond the recall or control of the acceptor.

If the contract sought to be established is unillateral—that is, where the offer simply requires the offeree to do something, and not to promise to do something—an intention on the part of the offeree to accept the offer, accompanied by a performance of the act, is all that is essential to the completion of the contract. In this case it is said that performance of the act is all the notice that the offerer requires, or that the form of the offer shows that notice is waived. Prescott v. Jones, *supra;* 9 Cyc. 270.

Applying these principles to the facts in this case, can it be said that the defendants' intention to accept the application and issue a policy in compliance with its terms was ever communicated to the applicant in his lifetime, so as to make a completed contract? We think not. * * *

According to these facts, it seems that the parties undertook to make a contract involving mutual promises, the applicant acting for himself, and Williamson acting as agent for the defendants; and it follows that their conduct is governed by the principles of law applicable to cases where the contracting parties are at the same place, and not at a distance, and that the contract was never completed, as the message of acceptance contained in the policy was never communicated to the applicant. Williamson was not the applicant's agent to receive the policy. * * *

The case is governed by the principles of law announced in Perry v. Insurance Co., *supra.* It follows, therefore, that a contract was not consummated, and that the action cannot be maintained. It is unnecessary to consider the questions raised by the exceptions to evidence.

Plaintiff's exceptions overruled.

§ 9.—Certainty of the Terms.

IN RE PURVES' ESTATE.

1900. 196 Pa. St. 438, 46 Atl. 369.

ACTION by Charles S. Purves against John B. Harper and another, as executors of the will of Alexander Purves, deceased, to enforce a claim against the estate. The following letter was the basis of his claim:

"PHILADELPHIA, August 12, 1895.

"Charles S. Purves, care Thomas Cook & Sons, London, Eng.:

"I received your letter from Rome. Glad to hear from you again. I have no doubt the sights you see become more interesting every day. I hope they will make an impression on your mind. The folks are as well as can be expected. Weather is quite warm. I am not feeling well myself, and wish you were home. There is no one who understands the business, which is improving. Iron has advanced in price. I sold all the plate iron on Tasker street, July 27th, to A. V. Kaiser & Co. The monitor turret and armor plate at $12 per ton, ship's hull and deck plate $10.50, where it lays. I want you to come home soon as possible. Don't go any further. Your services are required. I have no one I can place any confidence in to settle matters up. Attend to the business, and I will leave it to you as I promised you. Your grandfather, A. PURVES."

The claim was disallowed. Appeal.

BROWN, J.—* * * There is no doubt as to what the decedent wrote to the appellant; but there is uncertainty, very great, as to what he may have meant, and, unless he did mean what the grandson now contends for, we must approve the decree complained of. The alleged contract can be enforced if it can be definitely determined what the decedent meant by "business," and the terms upon which he agreed to leave the same to the appellant are not obscure, indefinite and doubtful. On the other hand, if the term "business" is vague, and it is uncertain what the decedent meant when he wrote, "I will leave it to you as I promised you," how can a court determine that an enforceable contract was entered into? If he failed to indicate what he meant by his "business," and to clearly and unequivocally express his intention in the writing upon which the appellant relies, is his estate to be distributed upon guess and conjecture? The learned president judge of the court below properly answered this question in saying: "If the meaning of the contract, and the subject to which it is to be applied, are obscure, indefinite, and doubtful, the contract will be held void for uncertainty." If he needed authority for this, he found it in Sherman v. Kitsmiller, 17 Serg. & R. (Pa.) 45. Whether the decedent intended by "business" his stock of iron,

materials and machinery, book accounts, office furniture, real estate, cash on hand, and "good will," or only the latter, or all combined, is most uncertain; for he gives no intimation of his intention. But equally doubtful are the words, "as I promised you." What was his promise? What was his agreement or undertaking with his grandson? Upon what terms and under what conditions had he promised to leave the business to him? The words, "I will leave it to you as I promised you," speak of a prior promise or agreement which the grandfather knew the grandson understood; but the court had no proof of what it was, or of the conditions under which it was made, and properly refused to theorize or conjecture what it meant. There is evidence that the appellant did not always understand the letter as he now interprets it and asks us to read it. Upon the death of his grandfather, instead of asserting in some manner his ownership to the business, as would have been most natural if he had then understood the letter as he now says he understood it, he continued simply as an employe, upon a salary raised by agreement with him from $15 to $30 per week. In view of the doubt and uncertainty in which the terms of the letter are involved, and the conduct of the appellant, who did nothing to indicate, during the life of his grandfather or even afterwards, until he made this claim, that he understood it, when he received it, to be the contract which he now seeks to enforce, we need say nothing more in our approval of the decree of the court below, which is affirmed, and the appeal dismissed, at the cost of the appellant.

THOMPSON, EXECUTOR v. STEVENS.

1872. 71 Pa. St. 161.

ACTION of assumpsit, for services by Rebecca M. Stevens against John P. Thompson, surviving executor of Abraham Shalkop, deceased. Judgment for plaintiff. Appeal.

SHARSWOOD, J.— * * * It is undoubtedly true, that contracts of this character, by which the estates of deceased persons are called on to pay large sums to nurses and housekeepers, ought to be very closely scanned, and juries instructed that they can only be made out by very clear proof. * * * Such a contract must of course possess the element of certainty, as was held by this court in Sherman v. Kitsmiller, 17 S. & R. (Pa.) 45, and Graham v. Graham's Executors, 10 Casey (Pa.) 475. But the maxim is, *Id certum est quod certum reddi potest.* In neither of the cases could that maxim be applied. In the first, the promise as set up, was to give the plaintiff 100 acres of land. One hundred acres of land where? Worth how much? Five dollars an acre or five hundred? "The promise," said Mr.

Justice Duncan, "is as boundless as the terrestrial globe." "The action only lies where a man by express words assumes to do a certain thing. Not that this means an absolute certainty, but a certainty to a common intent, giving the words a reasonable construction. But the words must show the undertaking was certain; for, in assumpsit for non-payment of money, it is necessary to reduce the amount to a certainty; or on a *quantum meruit,* by an averment, where the amount does not otherwise appear. Express promises or contracts ought to be certain and explicit to a common intent at least. They may be rendered certain by a reference to something certain." Sylvester's Case, Popham 148; 2 Roll. Rep. 104; 1 Leo. 88. In Graham v. Graham's Ex'rs, a promise to give the plaintiff, in consideration of services, "as much as to any relation on earth," was held to be indefinite. As our brother Williams said, in his opinion below, which was affirmed in this court: "The testator did not intimate what or how much he would give to any relative he had on earth." Who could say how much that would be? It depended on his own will, as if a man were to say, I will give you for these services just what I choose. In the case now before us, however, the contract as proved by Elizabeth Sheaf, and confirmed by the testimony of other witnesses was, that "if she (the plaintiff) would stay with him (the testator) as long as he lived, he would provide and give her full and plenty after he was gone, so that she need not to work." Now, certainly, here is a measure by which the amount can be ascertained, and which brings the case within the rule of certainty to a common intent. Consideration being had of the condition in life of the plaintiff, what annuity would place her in such circumstances that she need not work? The annuity tables settle what such an annuity is worth or can be bought for. * * *

Judgment affirmed.

WILLIAMS, J.—I dissent from this opinion, on the ground that the alleged contract is as indefinite and uncertain in its terms as the contract declared invalid in Graham v. Graham's Executors.

Prom. to sell land at price & terms offered by other parties is not too uncertain.

HAYES v. O'BRIEN ET AL.

1894. 149 Ill. 403, 37 N. E. 73.

BILL in chancery filed by Michael C. Hayes, against William D. O'Brien and Fayette Thompson for specific performance of a contract to convey land. Demurrer to bill. Bill dismissed. Appeal.

SHOPE, J.— * * * The land is described in the lease as a tract of land in Lake county, Illinois, and "being a part of the south half of sections thirty-four (34) and thirty-five (35), in township forty-

six (46), north of range twelve (12), east of the third principal meridian, more familiarly known as the 'old Merchant farm.'" The land is then described as divided into two unequal portions by the right of way of the Chicago and Northwestern Railroad Company through said land in a northerly and southerly direction, and the description concludes: "All of that portion east of said right of way, only, is leased to said party of second part." The land contracted to be sold and conveyed is the land leased. The description given is clearly sufficient to admit evidence aliunde the lease to identify the land. White v. Hermann, 51 Ill. 243; Bowen v. Prout, 52 *id.* 354; Bybee v. Hageman, 66 *id.* 519; Billings v. Kankakee Coal Co., 67 *id.* 489.

A deed or other written contract is not void for uncertainty in the description of the land sold or conveyed, if, from the words employed, the description can be made certain by extrinsic evidence of facts, physical conditions, measurements or monuments referred to in the deed. 1 Devlin on Deeds, § 1012; Smith v. Crawford, 81 Ill. 296; Rockafeller v. Arlington, 91 *id.* 375; Choteau v. Jones, 11 *id.* 300; Lyman v. Gedney, 114 *id.* 395. And thus, a defective description of land may be aided by the conduct of the parties, such as, that vendor put the purchaser in possession of the premises intended to be conveyed. Purinton v. Northern, etc., Railway Co., 46 Ill. 297; Railroad Co. v. McWilliams, 71 Iowa 164.

The more difficult question arises upon the objection that the contract is indefinite, uncertain, and incomplete in its terms. After providing that the leasehold estate shall continue for ten years, it is stipulated: "Said party of the first part hereby reserves the right or privilege of selling that portion of said land at any time from and after this date, but no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms and at the same price per acre as any other person or purchaser might have offered therefor." It is clear the latter part of this clause in the lease was inserted for the benefit of the lessee, and was intended to secure some right which he might otherwise not have had.

It is urged that the contract is void as a contract of sale, for the reason that there is no price fixed at which the sale should be made, and, it is said, if it is enforced, the court must interpolate that term into the contract. This, it is at once conceded, the courts may not do. Their duty is to enforce contracts as made by the parties. In the construction of contracts the intention of the parties, to be ascertained from the words employed, the connection in which they are used, and the subject matter in reference to which the parties are contracting, must control, and courts are powerless to interpolate terms and conditions into the contract to which the minds of the parties have not given assent. Courts will, however, look to the entire instrument, and, if possible, give such construction that each clause

shall have some effect and perform some office, (2 Parsons on Contracts, 7th ed. 633,) and for this purpose will, as far as practicable, view the contract from the position of the parties at the time it was made, in order to understand their language in the sense in which it was used, (Wilson v. Roots, 119 Ill. 384, Wood v. Clark, 121 *id.* 362,) and such construction will be adopted, if it can consistently and reasonably be done, as will render the whole contract operative. Field v. Leiter, 118 Ill. 21; Holmes v. Bemis, 124 *id.* 453; Bishop on Contracts, 391-393.

The lessor reserved the right to sell the land at any time, but covenanted that no sale of the land should be made by him without first having given the lessee the privilege of purchasing. Thus far there is no uncertainty. It will be seen, the lessee was given the right to purchase the land "upon such terms and at the same price per acre as any other person or purchaser might have offered therefor." This language is plain and unambiguous, and admits of no construction, other than that the terms and price per acre at which the lessee might purchase, were the same as offered by any other person or purchaser, and which the lessor was willing to accept. * * *

Decree reversed.

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§ 10.—Offer or Acceptance by Conduct.

GARST v. HARRIS.

1900. 177 Mass. 72, 58 N. E. 174.

HOLMES, C. J.—This is an action of contract to recover $21 as liquidated damages for breach of an agreement not to sell Phenyo-Caffein below a stipulated price. Phenyo-Caffein was a proprietary medicine purchased by the defendant of the plaintiff. At the time of the sale, and as a part of it, a written statement of terms, containing this agreement, was read to the defendant, and delivered to him. One stipulation expressed in the document was that the acceptance of the goods, with the notice of the conditions of the sale, should be an assent to the terms. The defendant accepted the goods, and expressed no dissent. There is no question, therefore, that he agreed to those terms upon the consideration of the sale, which was made with a deduction from the full retail price. The defendant sold the goods so purchased below the stipulated price, and broke his contract. So much of the defendant's argument as denies the agreement, the consideration, or the applicability of the contract to the goods sold, needs no further discussion. * * *

Judgment for plaintiff.

HOBBS v. MASSASOIT WHIP CO.

1893. 158 Mass. 194, 33 N. E. 495.

HOLMES, J.—This is an action for the price of eel skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and bear the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it was fair to assume that if it had admitted the eel skins to be over 22 inches in length, and fit for its business, as the plaintiff testified and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins.

In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See Bushel v. Wheeler, 15 Q. B. 442; Benj. Sales, (6th Amer. ed.) §§ 162-164; Taylor v. Engine Co., 146 Mass. 613, 615, 16 N. E. 462. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party,—a principle sometimes lost sight of in the cases. O'Donnell v. Clin-

ton, 145 Mass. 461, 463, 14 N. E. 747; McCarthy v. Railroad Corp., 148 Mass. 550, 552, 20 N. E. 182.

Exceptions overruled.

Pltf. worked out & spent money taking care of sick brother & his children. Held only rec. that his acts led her reasonably to think he would pay & that he reasonably should know that she expected pay.

SPENCER v. SPENCER.

1902. 181 Mass. 471, 63 N. E. 947.

HOLMES, C. J.—This is an action for personal services brought against the defendant by his sister, an unmarried woman. For a time she lived with him as his housekeeper for pay. Then he fell ill and she kept on for two years, receiving no pay, or at most, five dollars, which was disputed, but on the contrary working out and using the money she earned for the support of the defendant and his children. The judge instructed the jury in substance that the plaintiff could not recover unless she had expected to be paid for her services and had believed that the defendant knew that payment was expected for them, and unless the defendant had expected to pay for them and had believed that the plaintiff expected to have pay for them. The plaintiff excepted, and brings the case here after a verdict for the defendant.

We have felt some doubt whether these instructions should be construed to mean anything more than that the parties must have understood that they were dealing on a business footing, in which case we should hesitate to sustain the exceptions merely because of a theoretical leak to which no attention was called. Even so construed the proposition would be inaccurate since it would be enough to make a contract if the defendant as a reasonable man ought to have understood that the services were rendered for pay and not merely for love. But we are of opinion that the language of the judge went further than we have suggested, and too far for us to save it, however proper the verdict may seem to have been. Of course it does not matter whether the defendant expected to pay for the services or not, the question is as to the natural import of his overt acts. Manufacturing Co. v. Sawyer, 169 Mass. 477, 48 N. E. 620; Hobbs v. Whip Co., 158 Mass. 194, 197, 33 N. E. 495. Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound by accepting the services. Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347. It is unnecessary to criticize the ruling further.

Exceptions sustained.

WOODS v. AYRES.

1878. 39 Mich. 345, 351.

GRAVES, J.— * * * Where there is a spontaneous service as an act of kindness and no request, or where the circumstances account for the transaction on some ground *more probable* than that of a promise of recompense, no promise will be implied. The contract connection is not established. Bartholomew v. Jackson, 20 Johns. (N. Y.) 28; James v. O'Driscoll, 2 Bay (Conn.) 101; St. Jude's Church v. Van Denberg, 31 Mich. 287; Livingston v. Ackeston, 5 Cow. (N. Y.) 531; Nicholson v. Chapman, 2 H. Black. 254; Smart v. Guardians of the Poor, 36 E. L. & E. 496; Otis v. Jones, 21 Wend. (N. Y.) 394, 396; Ehle v. Judson, 24 Wend. (N. Y.) 97; Ingraham v. Gilbert, 20 Barb. (N. Y.) 151; Eastwood v. Kenyon, 11 Ad. and El. 438; Hertzog, 29 Pa. St. 465; Lange v. Kaiser, 34 Mich. 317. * * *

"Acts (or conduct) intended to lead to a certain inference may 'express a promise as well as words would have done.' The term 'tacit contract,' suggested by Mr. Austin, describes a genuine agreement of this nature better than the phrase 'an implied contract,' for the latter expression is sometimes used to designate legal obligations, which, in fact, are not contracts at all, but are considered so only by a legal fiction for the sake of the remedy." Bixby v. Moor, 51 N. H. 403.

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§ 11.—Performance of Conditions of Offer—Acceptance of Consideration.

Cont. Held offer for a unilateral Cont. made by promisee is wholly in writing under St. Frds. though act done by offeree to make cont. is of course not in writing. Good dis.

PLUMB v. CAMPBELL.

1888. 129 Ill. 101, 18 N. E. 790.

WILKIN, J.—This case originated in the circuit court of La Salle county. The declaration is in assumpsit, to which appellant, who was defendant below, filed the general issue, and two special pleas interposing the five years' statute of limitations. The first of these pleas avers that the contract sued on is not in writing, and the second, that it is partly in writing and partly by parol, to both of which appellee replied that the contract was in writing. Appellee recovered a judgment in the circuit court, for $14,000, which has been affirmed by the appellate court, and the record is brought before us by this further appeal.

The writing relied upon by appellee under the pleas of the statute of limitations, is as follows:

"AUGUST 17, 1875.

"This agreement witnesseth, that Ralph Plumb agrees to sell the fifty town bonds voted by the town of Douglass, in Effingham county, Illinois, to aid in the construction of the Bloomington and Ohio River railroad, for Samuel Campbell, unless prevented by some means which he cannot control, within twenty days after said Campbell shall place said bonds under the control of said Plumb, properly issued and dated, and deliver to said Plumb, the certificate of the supervisor of said town that the conditions upon which said bonds were voted have been complied with, so as to entitle said bonds to registry under the law, and out of the proceeds of said sale to pay said Campbell $45,000, and if said bonds shall sell for less than $45,000, said Plumb will pay said Campbell the deficit, and if they shall sell for more than $45,000 said Plumb may retain the excess for his fees for selling. RALPH PLUMB."

This he maintains is a written contract, on which he might bring his action at any time within ten years, under section 16, chapter 83, of the Revised Statutes, whereas appellant contends that it could only become an agreement when aided by parol evidence, and is therefore an oral contract, governed by the provisions of section 15 of the same chapter, barring the action in five years.

If it be true that the agreement, as set forth in writing, is so indefinite as to necessitate resort to parol testimony to make it complete, the law is, that in applying the statute of limitations it must be treated as an oral contract. Both reason and authority support this view.

The contention of appellant is, that for want of an agreement on the part of appellee to do anything on his part, as shown by the writing, there is want of that mutuality which is necessary to every complete contract. A promise for a promise is not a good consideration, unless there is mutuality, so that each party may hold the other to the performance of his engagements. It does not follow, however, that a contract in writing, to be complete, must show such mutuality on its face. There is a seeming want of mutuality in many cases of contract which may be enforced by the parties on the same proof as would have been necessary had that mutuality fully appeared—"as, where one promises to see another paid if he will sell goods to a third person, or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand, or suspend legal proceedings, or the like." (1 Parsons on Contract, § 450.) In commenting on this class of cases the author says: "Here it is said that the party making the promise is bound, while the other is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does or begins to do, the thing

which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation. So if the promisee begins to do the thing in a way which binds him to complete it, here is also a mutuality of obligation. But if, without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a complete consideration, and the original promise to do something if the other party would do something, is a continuing promise until that other party does the thing required of him."

A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee. Willetts v. Sun Mutual Ins. Co., 45 N. Y. 45—citing Train v. Gold, 5 Pick. (Mass.) 380; Hilton v. Southwick, 17 Me. 303; L'Amoreaux v. Golreed, 7 N. Y. 349 (6 Am. Rep. 31); Des Moines Valley Railroad Co. v. Graff, 27 Iowa 99 (1 Am. Rep. 256); Boston and Maine Railroad Co. v. Bartlett *et al.*, 3 Cush. (Mass.) 224; Langdell's Select Cases on Contracts 94.

These contracts are sometimes called unillateral contracts. Proof of assent is not necessary on the part of the promisee. It is sufficient if the required act be performed by him. Hare on Contracts 304.

On these authorities, it is clear that appellant could be bound, under this writing, in either of three ways: First, by appellee engaging, within a reasonable time, to perform the contract on his part; second, by beginning such performance in a way which would bind him to complete it; and third, by actual performance. If appellee was relying upon the first, and was attempting to show his engagement by parol, he would be within the rule insisted upon by appellant, and decided in Hurlbut v. Atherton, 59 Iowa 91. Such is not the case made by his declaration. He seeks, by the allegations of his declaration, to charge appellant, not because of any promise on his part, but because he, in fact, performed—actually did the things to be done by him. Under the allegations of the declaration, and the pleas, the terms of the contract between the parties are as definite as though the promise of appellee had been written at length and the paper signed by both. No parol proof was necessary, or even admissible, to add to or take from the writing. It cannot be maintained, that because proof of performance is necessary to hold appellant liable on his promise, therefore the contract rests partly in parol. The necessity for such proof is no greater than if the mutuality of the contract fully appeared upon the face of the writing. We perceive no reason for distinguishing this from an ordinary contract

in writing, in applying the statute of limitations, and therefore hold that the action was not barred. * * *

Judgment affirmed.

Parties at time of oral agreement intended writing. Later however without writing they would abide & deft acted as if cont were in force. Held binding on that grd.

MILLER v. McMANIS.

1870. 57 Ill. 126.

ACTION on alleged contract for the use of a patent right in certain counties whereby plaintiff was to receive two dollars for each machine manufactured and sold in those counties during the season of 1867. Verdict and judgment for plaintiff. Appeal.

WALKER, J.— * * * It is urged that the evidence fails to establish any contract entered into in 1866. Miller, one of the defendants, swears there was a verbal agreement that they should go on and pay appellee two dollars on each machine they should manufacture, but it was to be reduced to writing, which was never executed. He also says they did not intend to infringe or pirate upon his patent. He says he presumes they manufactured the machines under the verbal agreement. Appellee states substantially the same in regard to the terms of the agreement. But he calls it an agreement, and also an agreement for an agreement. Chritzman says he refused to sign the contract when presented, unless appellee would bind himself to indemnify them against suits for using the patent. He says there was no contract; and appellee says it was not to be binding, unless reduced to writing. Appellants, however, went on and manufactured machines, and unless they had given appellee notice that it was not under the proposition verbally made and accepted, he had a right to consider that it was under the verbal agreement.

If one person makes a proposition to another, and without any formal acceptance the latter proceeds to avail himself of the proposition, that will be a virtual acceptance, and he will be as fully bound as if he had, in terms, accepted the offer. Or if a contract is entered into and the terms agreed upon, and it is understood that it shall be in writing, and the parties perform the agreement, or one of them, without the objection of the other, enters upon the performance of the agreement, the contract, unless of the character required by the statute to be in writing, will be as binding as if reduced to writing as agreed. The writing gives no additional force or validity, except in cases arising under the statute of frauds. It is not the agreement, but the evidence of its terms and conditions. The agreement is the meeting of the minds in accord on the various propositions embraced in the contract. From the evidence in the case, we think the jury were warranted in finding the machines were manufactured under an agreement to pay two dollars on each.

Pt.

It is, however, urged that the verdict was excessive in the amount found by the jury. * * *

On this ground judgment reversed.

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§ 12.—Acceptance of Offer by Advertisement.

Cont. Offer for conviction. Held when act done cont made. Is in writing tho' only offer in writing. St. Lim. does not begin running until act fully done.

RYER v. STOCKWELL.

1859. 14 Cal. 134.

ACTION to recover the amount of a certain reward offered by the defendant for information that would lead to the arrest and conviction of the person or persons who set fire to the defendant's house.

A demurrer was put in, that the complaint did not state a cause of action; and that the cause of action did not accrue within two years. Demurrer sustained. Appeal.

Consid. ult later.

BALDWIN, J.— * * * 1. The grounds of demurrer were that this agreement is a nude pact, the plaintiff being bound to render the services, as a good citizen, without reward, and therefore cannot claim any, though specially promised it. But this position is not tenable. The defendant had a special interest in procuring this intelligence and evidently designed to furnish extraordinary inducements to the discovery of the facts; and the complaint alleges that the plaintiff put himself to extraordinary trouble to procure them. It can hardly be said that every citizen is bound, however meritorious the task may be, to quit his own business, and devote his time to the discovery of crime and bringing criminals to justice. Nor, that if a man who has lost his property agrees to give another a sum of money to go with him to discover or arrest the thief and recover the goods, he is not bound to pay that other if the latter performs the service.

2. The next objection is, that this claim is barred by the statute of limitations. We agree with the counsel for the respondent, that this paper on its face is not a written contract. It lacks mutuality. The plaintiff was no party to it. It is a mere proposition. But it may become a contract. It offers a given compensation for particular services, and invites the rendering of those services. Just as if a man were publicly to advertise that he would give any workman certain wages for doing work on his premises; if a workman, seeing the proposition, should go on and do the work, and, especially, if the advertiser received the benefit of it, we apprehend that no one would dispute that he could sue and recover. The services would, in such case, be rendered at the instance and by the request, of the employer and he would be responsible for the price. (See 11 Mass. 31; 14 *id.* 172, for cases in which the obligation of payment for services is implied from much slenderer material.)

This precise question arose in the case of Freeman v. The City of Boston, reported in 5 Metcalf (Mass.) 56. The mayor and aldermen of the city of Boston passed an order that a reward of five hundred dollars be offered to any person who shall give information so that any person shall be convicted of setting fire to any building for the purpose of burning the same. An advertisement was inserted in the city newspapers which were published the next morning after the order was passed, reciting that sundry houses and other buildings had recently been set on fire, and offering a reward of five hundred dollars to any person who should give information, so that any perpetrator of these outrages shall be convicted. Shaw, J., said in delivering the opinion of the court: "This is an action of assumpsit against the city of Boston, to recover a reward of five hundred dollars, for giving information of persons who had been guilty of setting fire to dwelling-houses. The plaintiff claims this on the ground that after the offer of a reward by the mayor and aldermen, in the manner hereinafter stated, he gave such information as to lead to the detection, trial and conviction of one Russell and one Crockett.

The principle on which the action is brought is now well settled. It is this: The offer of a reward or compensation, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good compensation, and the offer becomes a legal and binding contract. Of course, until the performance, the offer of a reward is a proposal merely, and not a contract; and, therefore, may be revoked at the pleasure of him who made it. A leading case on the subject of an action on the offer of a reward by public advertisement, is Symmes v. Frazier (6 Mass. 344). So in Loring v. The City of Boston (7 Met. (Mass.) 411), which was a suit of the same general character. The same eminent judge said: "There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract, made on good consideration, which the law will enforce. That this principal applies to the offer of a reward to the public at large, was settled in the case of Symmes v. Frazier, 6 Mass. 344, and has been frequently acted upon, and was recognized in the late case of Wentworth v. Day, 3 Met. (Mass.) 352. (See, also, Gilmore v. Lewis, 12 Ohio 281.) The same doctrine is held in England. (See England v. Davidson, 11 A. & E. 856; Lancaster v. Walsh, 4 M. & W. 16; Williams v. Cowardine, 4 B. & Al. 621; Chitty on Cont. 474, note 8.)

3. It has been seen that this reward was not offered merely for information, but for such information as would be sufficient to convict the criminal. This could only be determined by the event of the trial; and before trial and conviction, the plaintiff would have no claim on defendant for the money. It seems that the trial took place and conviction was had in January, 1857—if there be not some mistake in the dates as given in the transcript. The question, then, as to the statute of limitations is, when did it commence running, and what period applies? There is no doubt that the statute did not begin to run until the conviction of the felon. The statute (§ 17) provides that an action or liability founded upon an instrument of writing, except, etc., shall be brought within four years after the accrual of the cause of action.

This was, therefore, according to these authorities, a contract in writing, upon the acceptance of the terms of it by the plaintiff and his performance of the services. The action is really founded on this written contract, though extrinsic parol facts be necessary to give it effect as a cause of action—as is the case in suits on warranties, conditional agreements, and various other written instruments. Since the acceptance four years have not transpired, nor, of course, since the conviction.

It follows, that the lower court erred in sustaining the demurrer.

Judgment reversed and cause remanded.

SHUEY v. UNITED STATES.

1876. 92 U. S. 73.

STRONG, J.—* * * The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published

proclamation, he should have known that it could be revoked in the manner in which it was made.

Cent. Offer of reward continues only a reasonable time. No fact given.

MITCHELL v. ABBOTT ET AL.

1894. 86 Me. 338, 29 Atl. 1118.

WISWELL, J.—The plaintiff alleges that on the 23d day of February, 1878, the defendants published an offer of a reward; that upon the 31st day of March, 1890, the plaintiff performed the service which entitled him to the reward, in accordance with the terms of the offer.

Various objections to the maintenance of the suit are suggested and argued by the defendants' counsel. It is only necessary to consider one, which, we think, is an insuperable objection to the maintenance of the action, unless there are facts other than those set out in the plaintiff's declaration, viz.: that the offer of reward was a proposal to continue for a reasonable time only, and that it ceased to be a proposal long before the time when the plaintiff alleges he accepted it by a performance of the service for which the reward was to be paid.

The legal principles applicable to an offer of reward for the detection of an offender or the recovery of property are well understood. Such an offer is a proposal merely; if acted upon before revocation, the offer and acceptance by a performance become a valid contract for a sufficient consideration. It may be revoked at any time before it is acted upon.

The offer in this case was unlimited as to time, and, so far as we know, was never withdrawn by the act of those making it. We think that the proper construction of such a proposal is, as contended by the defendants, that it must be accepted by performance within a reasonable time, and that the law will, in the absence of other facts, conclusively presume a revocation after a reasonable time. Otherwise, it would be a perpetually continuing offer for all time. The statute of limitations would furnish no relief, nor limit the continuance of the offer, provided only that the action be commenced within the statutory period after performance. Such a construction would be most unreasonable, and one that could neither have been intended by the persons making the offer, nor contemplated by one who, twelve years later, was instrumental in bringing about the detection of the offender.

Our view is fully sustained by the Massachusetts court in the case of Loring v. Boston, 7 Met. (Mass.) 409. In that case a lapse of three years and eight months was held to be beyond a reasonable time.

In this case it is not necessary to decide what would be a reasonable time during which the offer would continue. A lapse of more than twelve years between the time of making the offer and the time of performance is certainly much more than a reasonable time. We are forced to presume, therefore, a withdrawal or revocation of the offer before the time of acceptance. * * *

Cont. (?) Action by informer per share & a fine. Under the St. the one who gives the first information was the one to get all informer's share.

UNITED STATES v. SIMONS.

1881. 7 Fed. 709.

PETITION for informer's share of a fine imposed by statute.

BROWN, D. J.—* * * It is well settled that in a contest between informers he is the informer who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered. U. S. v. George, 6 Blatchf. (U. S.) 406; Sawyer v. Steele, 3 Wash. (U. S.) 464; City Bank v. Bangs, 2 Edw. Ch. 95; Lancaster v. Walch, 4 M. & W. 16; U. S. v. Isla de Cuba, 2 Cliff. (U. S.) 458; 100 Barrels of Whisky, 2 Ben. (U. S.) 14; 50,000 Cigars, 1 Low. (U. S.) 22.

The fact that a person has procured valuable testimony, making a strong case against the offenders, but for which it is indeed doubtful whether any conviction could have been had, or any money recovered from them, does not entitle the person procuring such testimony to any portion of the fine, where the fraud has been discovered and disclosed by others, and proceedings have been commenced in pursuance of that information. The statute gives the informer's share to the one who furnishes the *original* information which shall lead to the recovery of the fine, but, whether justly or unjustly, awards nothing to those who furnish evidence to confirm the truth of the statements of the original informers, and this, although the applicant may have spent much time and expended money in ferreting out the details of the fraud, since their action cannot be said to have induced the prosecutions. U. S. v. George, 6 Blatchf. (U. S.) 406, 418. * * *

HOGAN v. STOPHLET.

1899. 179 Ill. 150, 53 N. E. 604.

ACTION by Daniel Hogan, sheriff of Pulaski county, to recover the amount of a reward offered for the apprehension and conviction of a person who had committed a felony in his own county. Judgment in circuit court for plaintiff. Reversed by appellate court. Appeal.

MAGRUDER, J.— * * * It being true that it was the official duty of the appellant, as sheriff, to make the arrest of the guilty party, and that the fees, which he is entitled to charge for the performance of his official duties, are fixed by law, it follows, upon well established principles, that the appellant was not entitled to the reward sued for in this case. It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy and illegal for a sheriff to receive for services, for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duty. (Pool v. City of Boston, 5 Cush. (Mass.) 219; Murfree on Sheriffs, § 1070.) A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it.

In Matter of Russell's Application, 51 Conn. 577, the facts showed, that an inhabitant of the city of Hartford, whose house was broken into in the night, offered a reward for the detection of the burglar: that certain policemen, during the hours allotted them for rest, discovered the burglar, and obtained information which led to his conviction; that policemen in that city were required by law to report all violations of law, and to arrest without warrant persons guilty of criminal offenses where the offenders were taken in the act, or on the speedy information of others; to render all possible assistance to the ministers of the law, and to exert themselves to prevent the commission of crime, etc.; and it was held by the court that to allow them to receive the reward would be both in violation of the city ordinances, and against public policy. In that case the court said: "It has been held from a very early period, that a promise to pay an officer a sum of money for doing a thing, which the law will not suffer him to take anything for, is merely void, however freely and voluntarily it may appear to have been made. * * * And it is now well settled that a public officer, whose compensation is fixed or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees in the form of a reward or in any other form, for services rendered in the line or scope of his official duties."

In Pool v. City of Boston, *supra,* it was held, that a watchman of the city of Boston, who, while in the discharge of his duty as such,

discovered a person setting fire to a building and prosecuted him to conviction, was not entitled to claim a reward offered by the city government for the detection and conviction of the incendiary.

In Davis v. Burns, 5 Allen (Mass.) 349, it was held, that an officer of the customs of the United States, who found smuggled goods, while assisting the inspectors in charge of a vessel and examining the passengers and their luggage, although he was not in discharge of the specific duty assigned to him, could not maintain an action to recover a reward, offered by the owners of the vessel to any person giving information to their agents or officers of any goods smuggled or concealed or intended to be smuggled therefrom. In the latter case the decision of the court was put upon the broad ground of public policy which forbids an officer to receive extra compensation for doing what his official duty requires him to do. * * *

In Lees v. Colgan, 120 Cal. 262, where a captain of police of the city and county of San Francisco apprehended a murderer in such city and county for a murder committed in another county, it was held that the captain made the arrest of the murderer in the line of his official duty and that it was against sound public policy to receive a reward offered by the government of the state for the arrest and conviction of the murderer; and in that case the court say: "The courts, both in this country and in England, are practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty." (See also, Marking v. Needy & Hatch, 8 Bush. (Ky.) 22; *Ex parte* Gore, 57 Miss. 251; Monroe County v. Bell, 18 So. 121; Thornton v. Railway Co., 42 Mo. App. 58; Kick v. Merry, 23 Mo. 74; Weaver v. Whitney, 1 Hopk. 13; Hatch v. Mann, 15 Wend. (N. Y.) 45.)

The claim that extra services have been rendered, furnishes no warrant in such cases for the charge of extra compensation. In Hatch v. Mann, *supra,* it was said: "That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretense, that it is for extra services, would cover any conceivable corruption or extortion. * * * If a constable for making extraordinary efforts to perform an ordinary official act, may not only receive, but may also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might, and soon would, put their 'extraordinary efforts' in the market, to be had by the highest bidder. This is a sickening and revolting view of the subject."

There are some decisions which hold to the contrary of the views herein expressed, but these decisions will be found upon examination to be cases where the officer arrested the offender beyond his terri-

torial jurisdiction, or cases arising under particular statutes, which did not make it the duty of the officer to make the arrest. Many of these decisions are reviewed in the very able opinion delivered by the supreme court of Connecticut In the Matter of Russell's Application, *supra,* and are there distinguished from such cases, as that which is presented by the present record.

The principles, announced by the authorities above referred to, have always been recognized as sound by this court. * * *

Judgment of appellate court affirmed.

WILLIAMS v. WEST CHICAGO ST. R. R. CO.

1901. 191 Ill. 610, 61 N. E. 456.

ACTION of assumpsit to recover $5,000 reward offered by defendant company for the "arrest and conviction" of certain murderers. Plaintiff, *before he knew of the offer,* identified a man already under arrest as having been seen by him near the place of the murder, and, on the subsequent arrest of another, also identified him in the same manner. The men arrested were convicted partly on plaintiff's evidence.

Judgment for defendant. Appeal.

HAND, J.— * * * The offer of a reward remains conditional until it is accepted by the performance of the service, and one who offers a reward has the right to prescribe whatever terms he may see fit, and such terms must be substantially complied with before any contract arises between him and the claimant. Thus, if the reward is offered for the arrest and conviction of a criminal, or for his arrest and the recovery of the money stolen, both the arrest and conviction or arrest and recovery of the money are conditions precedent to the recovery of the reward; and when the offer is for the delivery of a fugitive at a certain place the reward cannot be earned by the delivery of him at another place, and an offer for a capture of two is not acted upon by the capture of one. The reward cannot be apportioned. The offer is an entirety, and as such must be enforced, or not at all. 21 Am. & Eng. Ency. of Law (1st ed.) 391-397; Hogan v. Stophlet, 179 Ill. 150; Furman v. Parke, 21 N. J. L. 310; Fitch v. Snedaker, 38 N. Y. 248; Juniata County v. McDonald, 122 Pa. St. 115; Shuey v. United States, 92 U. S. 73.

In Hogan v. Stophlet, *supra,* which was an action for the recovery of a reward offered for the "apprehension and conviction of a criminal," this court said (p. 153): "The reward was offered for the apprehension and conviction of the person or persons who burned or caused the building to be burned. It thus appears that the reward was

offered, not for the conviction alone, but for the apprehension and conviction of the guilty party. Appellant is entitled to recover for both or he cannot recover at all. The reward cannot be apportioned —that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for the conviction. The offer must be enforced as an entirety, or not at all."

In Furman v. Parke, *supra,* the reward was "for the apprehension and conviction of such person or persons as may have been implicated in the murder of John B. Parke, John Castner, Maria Castner and child." The court say: "The reward is to be paid for the apprehension and conviction, not of one of several persons implicated, but of the person (if one) or the persons (if more than one) who were implicated, not in the murder of John B. Parke alone, but of John B. Parke and three other persons. * * * The person, therefore, to be entitled to the reward must aver and prove that the person or persons implicated in each of the four murders has or have been apprehended and convicted."

In Fitch v. Snedaker, 38 N. Y. 248, the offer was "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder," etc. It appeared that the claimant gave evidence which led to the conviction of the offender but did nothing towards securing his discovery or arrest, and it was held that he was not entitled to the reward. The court said (p. 250): "It is entirely clear that in order to entitle any person to the reward offered in this case he must give such information as shall lead to both apprehension and conviction—that is, both must happen, and happen as a consequence of information given. No person could claim a reward whose information caused the apprehension, until conviction followed. Both are conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that had the information been concealed or suppressed there could have been no conviction. This is according to the plain terms of the offer of a reward."

In Juniata County v. McDonald, *supra,* the reward was for the capture and delivery of a criminal to the jail, and a person who furnished information from which the capture resulted, but who did not deliver the prisoner or cause him to be delivered, was held not to be entitled to the reward. The court said: "A mere reading of this paper settles the whole controversy. The reward was not offered for information as to the prisoner's whereabouts, but for his capture and delivery. How, then, could one be entitled to that reward who neither captured nor delivered him? Admitting, then, that the plaintiff gave the sheriff accurate information as to where the culprit could be found, and that he went with him and acted as one of his posse,

yet on that officer fell the duty of arrest and the plaintiff was relieved of all responsibility."

And in Shuey v. United States, *supra,* which was a suit for a reward offered by the secretary of war "for the apprehension of John H. Surratt, one of Booth's accomplices," it was held that one who had made disclosures to which were due the discovery and arrest of Surratt was not entitled to the reward for his apprehension. The court say: "It is found as a fact that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were."

Under the authorities above cited the appellant cannot recover unless the evidence shows he caused the arrest and conviction of both Mannow and Windrath. He did neither. At most he furnished some information to the police which led to the arrest of Windrath, and identified both men as having been in the vicinity of the barn at the time of the commission of the crime, which does not bring him within the terms of the offered reward, which was for "the arrest and conviction of the murderer or murderers of C. B. Birch."

We are of the opinion that the appellant is not entitled to recover in this case for the further reason that the services performed by him were substantially all rendered before the reward was offered or at a time when he was ignorant of the fact that a reward had been offered. After the appellant had informed the superintendent of appellee and the captain of police that he had seen Mannow and his companion near the scene of the murder at about the time the same was committed, he did nothing towards securing the conviction of the prisoners other than what he could have been required to do as a witness. The reward was not offered for information which was already in the possession of the officers nor for witnesses who would come forward and testify to facts which were then known to be within their knowledge, but for the arrest and conviction of the murderer or murderers. The right to recover a reward arises out of the contractual relation which exists between the person offering the reward and the claimant, which is implied by law by reason of the offer on the one hand and the performance of the service on the other, the reason of the rule being that the services of the claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof by reason of the performance by him of such serivce, and no such promise can be implied unless he knew at the

time of the performance of the service that the reward had been offered, and in consideration thereof, and with a view to earning the same, rendered the service specified in such offer. Fitch v. Snedaker, *supra;* Howlands v. Lounds, 51 N. Y. 604; Stamper v. Temple, 6 Humph. (Tenn.) 113; 44 Am. Dec. 296.

In Stamper v. Temple, *supra,* which was an action to recover the amount of a reward, the court say: "To make a good contract there must be an *aggregatio mentium*—an agrement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered?"

In Fitch v. Snedaker, *supra,* on the trial several questions were asked of the plaintiff, who was a witness in his own behalf, relative to the person to whom he gave information in relation to the murder before the reward was offered or before he heard of it. The court sustained objections thereto and excluded the evidence. The ruling of the trial court in this regard on appeal was held to be correct, and the court, on page 251, say: "The form of action in all such cases is assumpsit. The defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties? To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. * * * Without that there is no contract. How, then, can there be consent or assent to that of which the party has never heard? * * * The offer could only operate upon plaintiffs after they heard of it."

And in Howlands v. Lounds, *supra,* the court say (p. 605): "In order to entitle a party to recover a reward offered, he must establish between himself and the person offering the reward, not only the offer and his acceptance of it, but his performance of the services for which the reward was offered; and upon principle, as well as upon authority, the performance of this service by one who did not know of the offer and could not have acted in reference to it cannot recover."

We are of the opinion the appellant failed to make out a cause of action, and that the trial court, for the reasons above suggested, properly directed a verdict for the appellee. The judgment of the appellate court will therefore be affirmed.

Judgment affirmed.

Cont. Offer to sell "a few jars"; Order for 500 gross. Held no cont. as diff. never offered any par. ticular and def. ordered baltimore, June 12, 1891, in the following words: der fixing amt. nd have to be accepted to make a cont.

ALLEN ET AL. v. KIRWIN ET AL.

1894. 159 Pa. St. 612, 28 Atl. 495.

GREEN, J.—* * * The first communication that passed between the parties was a letter from the defendants to the plaintiffs, dated Baltimore, June 12, 1891, in the following words:

"GENTLEMEN: We wired you the other day regard to caps, and

we hoped to have heard from you with order. We have a few jars that we can offer you at this time for immediate acceptance, at $8.00 for 1 qts., 11.00 for 2 qts., complete; delivered at Philadelphia. Terms sixty days, or less; two per cent., for cash, in ten days. Caps same price as before quoted. Awaiting your orders, we are yours, truly, KIRWAN & TYLER."

To this letter plaintiffs replied next day by telegram, as follows:

"PHILADELPHIA, June 13, 1891.

"Kirwin & Tyler:

"Letter 12th instant just received. Enter order for five hundred gross complete goods; also, will you give privilege of duplicating same, not later than middle of next week?

"R. J. ALLEN, SON & Co.,

The contention of the plaintiffs in this action of foreign attachment, brought by Allen, Son & Co., is that a binding contract was made by which the defendants Kirwin & Tyler were bound to deliver 500 gross of jars to them, in consequence of their telegram of June 13th to Kirwan & Tyler to enter order for 500 gross. There was no telegram or letter from Kirwan & Tyler by which they ever agreed to sell that many gross, and, unless a legal obligation on their part to sell that many arises out of their letter of June 12th and the plaintiffs' telegram of June 13th, the plaintiffs have no case. In their letter of the 12th, the defendants say they have a few jars which they can offer for immediate acceptance, at the prices named. To this, plaintiffs reply by telegram: "Enter order for five hundred gross." Of this order there was no acceptance. Does such an offer, followed by such an order, unaccepted, obligate the defendants to deliver the whole quantity ordered? The statement of this question seems to furnish its own answer. As long as the order was unaccepted there was no agreement to deliver 500 gross. The offer was to sell "a few" gross. Such an offer was of an indefinite quantity. It gave the plaintiffs a right to name a quantity, and, if the quantity named was accepted by the defendants they would be bound to deliver that quantity. But, if the quantity named was unaccepted, how could the defendants be legally bound to deliver the quantity named? At what point of time and in what words did the plaintiffs ever agree to deliver 500 gross? Not by anything occurring after the order, because all of the telegrams and letters of the defendants after their original letter of June 12th were a continual and constantly-repeated assertion of their inability to deliver that quantity, because they did not have them and could not get them. Not by the original letter of June 12th, because in that they did not offer to sell any definite quantity. By consequence, in order that they should become legally bound for any definite quantity, no matter whether large or small, their assent to that particular quantity must be obtained. They said they had a few jars to sell. What does that mean? It is very clear it does not mean 50 jars, or 100, or 1,000, or any other particular number.

It is impossible to understand how it can certainly and definitely mean the particular number 72,000 jars. The plaintiffs' contention is that it does have such legal meaning, because they indicated that number in their order, and that this alone bound the defendants to that number. They say "a few" authorized them to fix 72,000. But the answer is a few does not authorize the plaintiffs to bind the defendants to any definite number without their consent, and, until such consent is obtained, the defendants are not bound. Not a solitary authority or text-writer's opinion is offered by the plaintiffs in support of their contention, nor is it believed any such can be found. On the contrary, a number of cases quite analogous in the character of the questions raised are cited by the defendants, and seem to control the determination of the subject. Thus, in the case of Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, the defendants wrote to the plaintiffs as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full cargo lots of eighty to ninety-five barrels, delivered in your city, at 85 cents per barrel, to be shipped per C. & N. R. Co. only. At this price, it is a bargain, as the price in general remains unchanged. Should be pleased to receive your order." To this the plaintiff replied by telegraph the next day: "Your letter of yesterday received and noted. You may ship me 2,000 barrels Michigan fine salt, as offered in your letter. Answer." The plaintiff sued for failure to deliver, and filed a statement of claim, setting out the letter and telegram, and also alleging that he was accustomed to buy salt in large quantities, and that 2,000 barrels was a reasonable quantity for him to order, which the defendants might reasonably expect him to order from their knowledge of his business. To this statement the defendant demurred, and the demurrer was sustained, on the ground that the letter and statement did not make out a contract. This case is very closely in point with the present. * * *

Other cases having more or less analogy are cited for the appellants, viz.: Beaupre v. Telegraph Co., 21 Minn. 155; Ashcroft v. Butterworth, 136 Mass. 511; Ahearn v. Ayers, 38 Mich. 692—but it is unnecessary to review them, as the question is too simple and easy of solution upon the plainest principles. We are clearly of opinion that no contract for the delivery of 500 gross of jars was ever made between these parties, and therefore the jury should have been instructed to render a verdict for the defendants. The assignments of error are all sustained.

Decree reversed.

CHAPTER II.

CONSIDERATION.

In every contract containing a promise there must be a consideration for the promise.

***Qualification.*—If such contract is under seal, or negotiable, the form imports a consideration.**

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§ 13.—Necessity of Consideration for a Promise.

COOK v. BRADLEY.

1828. 7 Conn. 57.

THIS was a bill in chancery, brought by Bradley against Hannah Cook, administratrix of Henry Cook, deceased, praying for the correction of a mistake in a discharge given by Bradley to Henry Cook, or for an injunction against the use of that discharge in an action at law, pending in the superior court.

On the 18th of February, 1808, Henry Cook signed and delivered to Bradley a writing in these words: "This may certify that the debt now due from my father Jonathan Cook, to Joel Bradley, I acknowledge to be for necessaries of life, and of such a nature that I consider myself hereby obligated to pay said Bradley sixty dollars toward said debt now due, provided my father does not settle with said Bradley in his lifetime."

DAGGETT, J.—The question presented on this record for discussion, arises on the validity of the promise of the deceased, Henry Cook, stated in the bill. If no action can be supported on that contract then the interference of the court to exercise its chancery power, to explain or invalidate the discharge, would be useless; and the examination of other points suggested in argument, unnecessary. I am satisfied, on a full view of the case, that the contract is void, for want of consideration; and therefore, that no action can be supported on it.

1. The contract is not a specialty, though in writing; nor is it governed by the law merchant applicable to negotiable paper. Were

it of the first description, by the rules of the common law, the consideration would be locked up, and could not be inquired into. Were it a note or bill of exchange, the law merchant would give to it the same force in relation to third persons. It is true that in Pillans & Rose v. Van Mierop & Hopkins, 3 Burr. 1663, a suggestion was made by Wilmot, and the judges who sat with him in the king's bench, that mere want of consideration could not be alleged in avoidance of a contract in writing. This suggestion was never established as law; and in the case of Rann v. Hughes, 7 Term Rep. 350n., the true doctrine of the common law was laid down. The mere written contract is upon the footing of a parol contract, and a consideration must be proved. This is an inflexible rule of law; and the court is not at liberty, if it had the disposition, to subvert it. *Ex nudo pacto non oritur actio.*

2. What is a consideration sufficient to uphold a contract? Here, too, the common law furnishes the answer; a benefit to the party promising, or a loss to the party to whom the promise is made. The quantum of benefit, on the one hand, or of loss on the other, is immaterial. Powell on Contract, 343, 344. To multiply authorities on this point, is quite unnecessary.

Let us now apply these uncontroverted principles to the case before us. Could Henry Cook possibly receive any benefit from this contract? He gained nothing—nothing was renounced hereby. Was he induced by any loss to the promisee? He advanced nothing—he became liable for nothing—he did not forego anything, by or on the ground of it. He had before, not at the request of Henry Cook, but of Jonathan Cook, furnished the latter with necessaries for his support. It is impossible to discover, thus far, any consideration known to the law.

3. The defendant in error still insists, that the father being poor and unable to support himself, and the son being possessed of large property, a legal obligation rested on him to pay for these necessaries thus furnished; and a legal obligation is a good consideration for a promise. The conclusion is just, if the premises are true. But was there this legal obligation? If it exist, it is to be found in our statute providing for the support of paupers. Stat. 369, tit. 73, c. 1. Provision is there made, that poor and impotent persons, unable to support themselves, shall be supported by their children, if of sufficient ability. The manner in which they shall be compelled to furnish this support, is prescribed. The selectmen of the town, where the poor persons reside, or one or more of their relations, may make application to the county court, and the court may order such support to be supplied, by the relations of the poor persons, from the time of such application. The facts are to be ascertained by the court. The provision is prospective only. It regards no supplies already furnished, or expenses already incurred; and the liability, the legal obligation, is precisely as extensive as the law establishes it,

and no greater. By this statute, then, for these reasons, the legal obligation alleged in support of this contract, does not appear.

That such is the construction of this statute, I cite the opinion of the supreme court of Massachusetts in Mills v. Wyman, 3 Pick. (Mass.) 207, 212, as to a similar statute of that state; and especially, I rely on the decision of this court, in Wethersfield v. Montague, *et al.*, 3 Conn. 507. One of the points settled in that case was, that "no assessment could be made, by virtue of this statute, for past expenditures, the provisions of the statute being exclusively prospective." The principle then is, that there is no legal obligation to pay past expenditures; which exonerates the son in this case from all legal liability for the expenditures for the father.

4. This opens to us the only remaining point. The counsel for the defendant in error urge that the son was under a moral obligation to support the father—that this is a sufficient consideration to uphold the promise; and that, therefore, the son is liable.

It cannot be successfully contended that in every case where a person is under a moral obligation to do an act, as, to relieve one in distress, by personal exertions, or the expenditure of money, a promise to that effect would be binding in a court of law. Such an idea is unsupported by principle or precedent. It is a just rule of morality, that a man should do towards others what he might reasonably expect from others, in like circumstances. This rule is sanctioned by the highest authority, and is very comprehensive. An affectionate father, brother or sister, has taken by the hand the youngest son of the family; given him an education and placed him in a situation to become, and he has become, affluent. The father, brother or sister, by the visitation of Providence, has become poor, and impotent, and houseless. The son, rolling in riches, in the overflowings of his gratitude, for kindness experienced, contracts in writing to discharge some portion of the debt of gratitude, by giving to his destitute relative some one of his numerous houses for a shelter, and a thousand of his many thousand dollars for his subsistence—can such a promise be enforced in any judicial tribunal? Municipal laws will not decide what honor or gratitude ought to induce the son to do in such a case, as (Dr.) Blackstone remarks (2 Bla. Com. 445), but it must be left to the forum of conscience.

It cannot be denied, that many distinguished judges have laid down the principle, that moral obligation is alone a sufficient consideration to support a contract. Thus did Lord Mansfield, in Cowper 288, 544. He was followed by Mr. Justice Buller, by Lord Ellenborough and other judges, in other cases. But it is an obvious remark, that the cases cited in illustration of those positions, were all cases where a prior legal obligation had existed, but by reason of some statute, or stubborn rule of law, it could not be enforced: as a promise to pay a debt barred by bankruptcy, or the statute of limitations, or a promise by an adult to pay a debt contracted during

minority. In all these instances, a good consideration existed; for each had received a benefit.

All the cases on this subject are carefully, and with just discrimination, revised, in a note in 3 Bos. & Pull. 249, and the true distinctions taken. The law of this note has been recently adopted in the supreme court of New York in the cases of Smith v. Ware, 13 Johns. (N. Y.) 257, 289, and Edwards *et ux.* v. Davis, 16 Johns. (N. Y.) 281, 283n., and in a still later case (in the year 1826), in Massachusetts, viz.: Mills v. Wyman, 3 Pick. (Mass.) 207—a case referred to above for another purpose. No stronger case of moral obligation can be found. "A son who was of full age, and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff, promising to pay him the expenses incurred; it was held, that such promise would not sustain an action." I am well satisfied with the very able and sound reasoning of the court, delivered by Chief Justice Parker, on that occasion.

I will now advert to the particular decisions of the English courts, cited at the bar and relied on. Watson v. Turner, Bull. *nisi prius* 147. It is no longer doubted that the defendants in that case, the overseers of the poor, were under a legal obligation to furnish the support for which the promise was made. It is a case, therefore, within the rule in 3 Bos. & Pull. 249n. The case of Scott v. Nelson, cited Esp. Dig. 95, and an anonymous case in 2 Shower 184, seem to imply that a father was holden liable on a promise to pay for supplies for his bastard child; but in my opinion, it may be safely inferred from the facts that the supplies were furnished on request; which would make a material difference. In Wing v. Mill, 1 Barn. & Ald. 104, the whole court held that a legal and moral obligation existed. In the case of Barnes v. Hedley & Conway, 2 Taun. 184, the court held, that when the parties to usurious securities stripped them of all usury, and the securities were given up and cancelled, by agreement of the parties, and the borrower of the money promised in consideration of having received the principal, to pay the same with legal interest, the promise was binding. This case rests upon the same principles, which were recognized by this court in the case of Kilborun v. Bradley, 3 Day (Conn.) 356: where the court decided, that if a usurious security be given up, and a new security be taken for the principal sum due and legal interest, the latter security will be good. This bears not at all upon the case under consideration. The money advanced was a good consideration of the promise to repay it, the usury being expunged. In the case of Lee v. Muggeridge *et al.*, executors of Mary Muggeridge, deceased, 5 Taun. 36, it was held that a *feme covert* having given a bond for money advanced to her son-in-law, at her request, was bound by a promise made by her, after she became discovert. Mary, the obligor

in that case, had a large estate settled to her separate use. In this condition she executed a bond for money advanced to her son-in-law, at her request. After the death of the husband, and while single, she wrote a letter promising to pay the amount thus advanced. The court, in giving their opinion, say, this is a promise founded on a moral obligation, and that it is a good consideration. I should say the promise was founded on the advancement of the money, at her request, to her son-in-law, and as she was incapacitated to bind herself, by reason of the coverture, when she received the benefit, and is therefore protected from liability by a stubborn rule of law; yet if, when this rule of law ceases to operate upon her, she will promise to pay, it will bind her.

On the whole, I am not satisfied, that a case can be found in the English books, in which it has been held that a moral obligation is a sufficient consideration for an express promise, though there are many to the contrary, but that it is limited in its application to the cases where a good and valuable consideration has once existed, as laid down by the supreme court in Massachusetts, once and again adverted to.

COTTAGE STREET M. E. CHURCH v. EDWARD KENDALL, EXECUTOR.

1877. 121 Mass. 528.

ACTION to recover the amount of a subscription by Amos P. Rollins, the defendant's testator towards the erection of a chapel for the plaintiff. Judgment for the plaintiff. Defendant excepts.

GRAY, C. J.—The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by the law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. Exchange Bank v. Rice, 107 Mass. 37. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made.

A promise to pay money to promote the objects for which a corporation is established falls within the general rule. In every case in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building in accordance with the terms of the contract, and upon the faith of the de-

fendant's promise. Fisher v. Ellis, 3 Pick. (Mass.) 322; Bryant v. Goodnow, 5 Pick. (Mass.) 228; Amherst Academy v. Cowls, 6 Pick. (Mass.) 427; Williams College v. Danforth, 12 Pick. (Mass.) 541; Thompson v. Page, 1 Met. (Mass.) 565; Ives v. Sterling, 6 Met. (Mass.) 310; Watkins v. Eames, 9 Cush. (Mass.) 537; Mirick v. French, 2 Gray (Mass.) 420; Ladies' Collegiate Institute v. French, 16 Gray (Mass.) 196; Athol Music Hall Co. v. Carey, 116 Mass. 471. To the latter class belongs Hanson Trustees v. Stetson, 5 Pick. (Mass.) 506, in which the subscriptions were to increase a ministerial fund, and the court "found it a fact agreed" (whether in the case stated, or by counsel at the argument, does not clearly appear by the report) "that, in consequence of the accumulation of the fund by these means, the great purpose, viz.: the settlement of a minister, has been effected."

Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward. Freeman v. Boston, 5 Met. (Mass.) 56; Loring v. Boston, 7 Met. (Mass.) 409; Carr v. National Security Bank, 107 Mass. 45, 48.

The suggestion in 5 Pick. (Mass.) 508, substantially repeated in 6 Met. 316, and in 9 Cush. (Mass.) 539, that "it is a sufficient consideration, that others were led to subscribe by the very subscription of the defendant," was in each case but *obiter dictum*, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him.

The facts in the present case show no benefit to the defendant, and no vote or contract by the plaintiff, and, although it appears that the chapel was afterwards built by the plaintiff, it is expressly stated in the bill of exceptions that the learned judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not therefore appear that there was any legal consideration for the promise upon which this action is brought.

Exceptions sustained.

ESTATE OF MARY BEATTY, DECEASED v. WESTERN COLLEGE.

1898. 177 Ill. 280, 52 N. E. 432.

A CLAIM, based on the following note, was filed against the estate of the deceased and judgment was obtained thereon. Appeal.

$7,000. DOVER, ILL., December 9, 1887.

"In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest: Provided, that in the event of my death before the maturity of this note, it shall become then due.

"P. O. Dover, County Bureau, State Illinois.

"MARY BEATTY."

"Witnesses, H. H. Maynard, W. M. Beardshear."

MAGRUDER, J.— * * * The proof tends to show that the note for $7,000 was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund, or promote an object. It is well settled that a promissory note without consideration, and intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer and may, by necessary consequence, be revoked at any time before it is acted upon." (Pratt v. Trustees, 93 Ill. 475.) In Blanchard v. Williamson, 70 Ill. 647, we said (p. 652): "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration." (Shaw v. Camp, 160 Ill. 425; Williams v. Forbes, 114 Ill. 167; Richardson v. Richardson, 148 id. 563; Pope v. Dodson, 58 id. 360.)

But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it, if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person, so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original under-

taking. We have said: "It is the expending of money, etc., or incurring a legal liability on the faith of the promise, which gives the right of action; and without this there is no right of action." (Pratt v. Trustees, 93 Ill. 475; Beach v. First M. E. Church, 96 id. 177; Hudson v. Green Hill Seminary, 113 id. 618.)

In Simpson Centenary College v. Tuttle, 71 Iowa 596, the supreme court of Iowa said: "Where a note, however, is based on a promise to give for the support of the objects referred to (founding a school, church or other institution of similar character), it may still be open to this defense (want of consideration), unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor should be estopped from pleading want of consideration." (Wesleyan Seminary v. Fisher, 4 Mich. 514; Amherst Academy v. Cowls, 6 Pick. (Mass.) 427; Roberts v. Cobb, 103 N. Y. 600; Johnston v. Wabash College, 2 Ind. 555; Roche v. Roanoke Classical Seminary, 56 id. 198; Simpson Centenary College v. Bryan, 50 Iowa 293; Vierling v. Horton, 27 Ill. App. 263; Pryor v. Cain, 25 Ill. 292; M. E. Church v. Kendall, 121 Mass. 528.)

There was evidence in the case at bar tending to show that the appellee expended money in the construction of the building, known as "Ladies' Boarding Hall," upon the faith of the promise made by the deceased as embodied in the note for $7,000.

Judgment affirmed.

Seal.

A seal is an impression on wax, or other tenacious substance, capable of being impressed.

In Illinois, and several of the states, it is provided by statute that any instrument of writing to which the maker shall affix a scrawl by way of seal, shall be of the same effect and obligation, to all intents as if the same were sealed. Rev. Stat. Ill., Ch. 29, § 1.

A contract under seal is frequently called a specialty or deed. A contract not under seal, whether written or oral, is called a simple or parol contract.

At common law a seal imports a consideration but under statutes, in most of the states, including Illinois, the want of a consideration may be pleaded and proved though the contract be under seal. Rev. St., Ch. 98, § 9.

And, even in the absence of such statutes, voluntary agreements, though under seal, are not enforceable in the courts of equity (a) nor at common law, if in partial restraint of trade (b).

(a) Crandall v. Willig, 166 Ill. 233, 239; 46 N. E. 755.
(b) Ross v. Sadgbeer, 21 Wend. (N. Y.) 166.

Negotiable Instrument.

A contract is said to be negotiable if it can be so transferred that the assignee has the right to sue upon it at law in his own name, as a bill of exchange or a promissory note.

The form of a negotiable instrument imports a consideration.

But, in most of the states, the want of a consideration of a negotiable instrument may be shown, except against a *bona fide* assignee thereof, for value, before its maturity.

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§ 14.—Consideration Defined.

CLARK'S APPEAL.

1889. 57 Conn. 565, 19 Atl. 332.

SHELDON CLARK, who was unmarried and sick with consumption, lived with plaintiffs at intervals for about a year, and paid his board. Plaintiffs, in addition to his board, rendered him various small services, particularly in the care of him when sick, for which he promised to pay them. A short time before his death he delivered plaintiffs his note for $700, and said to them: "I want you to have that if I die, but if I get well I want the note back, and I will then pay you what is right." Held, that the note was made on sufficient consideration. Appeal.

ANDREWS, C. J.—* * * We think the note was made on sufficient consideration. Prof. John William Smith, in his lectures on the law of contracts, in answer to the question "What does the law recognize as a consideration capable of supporting a simple contract?" gives this short practical rule: "Any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon him to whom the promise is made, is a sufficient consideration in the eye of the law to sustain the promise." And he adds: "Accordingly, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract." Smith, Cont. 141, 148. Judge Storrs, in Clark v. Sigourney, 17 Conn. 517, says: "Any act done by the promisee at the request of the promisor, by which the former sustains any loss, trouble, or inconvenience, constitutes a sufficient consideration for a promise, although the latter obtains no advantage therefrom; and in respect to the extent of such loss, trouble, or inconvenience it is immaterial that it is of the most trifling description, provided it be not utterly worthless in fact and in law." See, also, Barnum v. Barnum, 8 Conn. 469. "A valuable consideration, in the sense of the law, may consist

either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Currie v. Misa, L. R. 10 Exch. 162. "If the parties, being in a situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation." Pom. Eq. Jur., § 926. "In the absence of * * * fraud, * * * inadequacy of consideration is not sufficient to avoid a contract, even in equity." Bedel v. Loomis, 11 N. H. 19. Chancellor Kent, in Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression." "Inadequacy of consideration is not, then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract." 1 Story Eq. Jur., § 245. See also, Warner v. Daniels, 1 Woodb. & M. (U. S.) 110; Train v. Gold, 5 Pick. (Mass.) 380; Boothe v. Fitzpatrick, 36 Vt. 681.

The case of Worth v. Case, 42 N. Y. 362, is a case very similar in many respects to the one now in hand. It was brought against the defendant as the executor of Theron B. Worth, on a note for $10,000. The plaintiff and Theron were sister and brother. The plaintiff resided in Corning, not keeping house but living in a furnished room. Theron lived in Southold. He visited the plaintiff at her residence several times. At a visit in January, 1864, he was very ill there. She gave up her room and bed to him, and he spent his entire time in them. She nursed him, bathed him, and rubbed his limbs every morning during his sickness. She also brought his meals to him from the hotel and rendered other attention to him while he was sick. He paid the bill at the hotel, but paid her nothing for her service. Several times during his stay he spoke to her about paying her, and said he would pay her well. On the day he left her house, January 30, 1864, he handed her a sealed envelope endorsed: "Mary C. Worth. This is not to be unsealed while I live, and to be returned to me at any time I may wish it. T. B. Worth." The plaintiff was not informed and did not know what the envelope contained until she opened it after her brother's death, in 1867, and found in it the note on which the suit was brought. Theron left a will by which he gave to the plaintiff the sum of $1,000. The plaintiff had a verdict for the amount of the note; in sustaining which the court of appeals said: The note was given for services rendered, and, if the note speaks truly, he then considered those attentions worth $10,000. "He chose for these services to execute the note. We have no pecuniary standard by which we can weigh or measure their value to him. He estimated them then, and continued to do so, at $10,000;

and those who stand in his shoes have no right to repudiate the contract which he made." Dean v. Carruth, 108 Mass. 242, is another case of like kind. The case of Wolford v. Powers, 85 Ind. 294, was brought on a promissory note executed in consideration of a father's naming a child after the promisor, and in pursuance of the promisor's agreement that if the child were so named he would provide for its education and support. It was held that this was a valid consideration. In delivering the opinion the court said: "When a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless there is evidence of fraud. There is in such a case absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases mentioned, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this is not so, then the result is that the court substitutes its own judgment for that of the promisor, and in doing this makes a new contract. When the purpose of the party is to secure a pecuniary or property benefit, there is much more ground for judicial interference than in a case like this, where the controlling purpose is not gain, but the gratification of a desire or fancy. Even in the former class of cases, courts never do interfere upon the sole ground of inadequacy of consideration, and certainly should not in the class to which the one at bar belongs. No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. If there be any consideration at all, it must be allotted the value the parties have placed upon it; or a conjectural estimate made arbitrarily, and without the semblance of a guide, must be substituted by the courts." Earl v. Peck, 64 N. Y. 596, was a case brought on a note for $10,000 executed by the defendant's testator. The plaintiff had been in the service of the deceased for some six or seven years as his housekeeper, and he was indebted to her for her services. The note was made only about two hours before his death. No contract had been made as to the rate of compensation for the services, but the deceased had said he would pay her well, and the evidence tended to show that the amount of compensation was to be left to him. The court said: "Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud, * * * is not a defense to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred." See also, Cowee v. Cornell, 75 N. Y. 91.

The services rendered by Charles Clark and his wife to Sheldon Clark, and for which this note is the promise to pay, if they should be drawn out on a book in the form of an account, with the times and

dates, and the thing done, and prices, might not amount to $700. But to Sheldon Clark, alone in the world, unmarried, without family or near kindred to make a home for him, sick of a wasting disease, who can measure their value so well as he? He put his own estimate upon them, deliberately and without "speck of imposition." If he chose to pay for the services rendered a much larger sum than they were apparently worth, he had the right to do so. The note was not a gratuity or a testamentary gift. There is no standard whereby courts can limit the measure of value in such a case; and the note is not wanting, even partially, in consideration because the value of the consideration is less than the obligation. The superior court is advised to render judgment for the appellant to recover of the estate of Sheldon Clark the amount of the note.

Motive is not the same as consideration. Consideration consists in what is actually given or suffered and accepted for a promise; ulterior motives, though present, are immaterial. Thomas v. Thomas, 2 Q. B. 851.

Cont. Benef. Promisee. Held Benef. Can sue
prom. relying on fact that
in this case Benef. had
done the substantial
act of consid.
Held in fact
ed sue for
Services.

GOODEN v. RAYL ET AL.

1892. 85 Iowa 592, 52 N. W. 506.

L. L. GOODEN and the defendants agreed that the former's infant daughter should reside with and serve the defendants' family until she reached the age of 18, she to be clothed, fed, educated, and treated as a member of defendants' family and to receive certain described chattels for her service on her reaching the age designated. The daughter entered upon the performance of the contract, and continued to perform until she was compelled by the defendants to leave their home, and thereupon she brought an action for a breach of the contract. Demurrer to her petition. Sustained. Appeal.

ROTHROCK, J.— * * * There are some fifteen alleged grounds of demurrer. We do not think it is necessary to set them out in full. They all involve the question whether the plaintiff, Emma Gooden, has the right to maintain an action on the written contract, and our discussion of the case will disclose the objections made to the petition by the counsel for the defendants. In the first place, it is claimed by appellees' counsel that it does not appear from the petition that the plaintiff entered the family of the defendant in pursuance of the terms of the contract, because the contract is no part of the petition. The contract is expressly made a part of the petition, and the petition must be read and construed in the light of the contract. When this is done, we have the plain and not uncommon case of one party contracting for another for the benefit of a third party, and an action by the third party for a breach of the contract. That

such an action can be maintained there can be no question. If A delivers money or property to B under a promise that he will deliver it to C, the latter can maintain an action against B for a breach of the contract. So in the case at bar, if L. L. Gooden entered into the contract in question with the defendants, and the plaintiff entered upon the performance of the contract, and continued to perform until she was compelled to leave the home of the defendants, she may maintain an action against the defendants for a breach of the contract. The court below must have been of the opinion that the plaintiff could not maintain the action, for the reason that she was and is a minor. The rule of law in relation to the rights of infants to maintain an action on contract is well stated in 5 Wait, Act. & Def., p. 75, as follows: "The law takes the rights of infants under its special protection, and secures to them the same remedies which it gives to adults. An infant may sue on any contract made with him personally by an adult. He can maintain an action for services rendered by him under a contract, especially if he has been emancipated, or is not living with and supported by his parents." In the case at bar the contract was not made with the infant personally. But it was made by the father of the infant, for the benefit of the infant, and there is no question of emancipation in the case. There is no liability of the defendants to the father under the contract. If there ever was such liability there is none now, for the father, by commencing this suit as the next friend of his child, by that very act releases the defendants from any supposed liability there may be to him under the contract. The case is in all its essential features like Strong v. Marcy, 33 Kan. 109, 5 Pac. 366, where it was held that a minor could maintain an action upon a contract like the one now under consideration; and see, also, Schouler, Dom. Rel. 345, 370, 371. The case demands no further consideration. In our opinion, the court erred in sustaining the demurrer to the petition.

Reversed.

Cont. Giving up right to contest a will is consid. Sole test can see on grd that gift is complete.

RECTOR, ETC., OF ST. MARK'S CHURCH v. TEED.

1890. 120 N. Y. 583, 24 N. E. 1014.

VANN, J.—The question presented for decision by this appeal is whether the instrument upon which the action was brought is supported by a consideration that the law recognizes as sufficient. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." 3 Am. & Eng. Ency. Law 831; Currie v. Misa, L. R. 10 Exch. 162; Chit. Cont. (9th Am. ed.) 29; 2 Kent

Comm. 465. It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is, in a legal sense, injured. The injury may consist of a compromise of a disputed claim, or forbearance to exercise a legal right; the alteration in position being regarded as a detriment that forms a consideration, independent of the actual value of the right forborne. Thomas Wright, as the sole heir at law and next of kin of the decedent, would have inherited the entire estate if he had succeeded in his effort to defeat the probate of the will. He was, therefore, "particularly interested in setting aside the will," within the meaning of that phrase as used in the case of Seaman v. Seaman, 12 Wend. (N. Y.) 381, which we regard as analogous to this and which has been repeatedly followed. Palmer v. North, 35 Barb. (N. Y.) 293; Bedell v. Bedell, 3 Hun (N. Y.) 583; Hall v. Richardson, 22 Hun (N. Y.) 447. * * *

The withdrawal of the objections to the probate of the will at the special request of the defendant, was the forbearance of a legal right, and constituted a consideration sufficient to support a promise by him, even if he was to receive no benefit whatever. "Whether he would have succeeded in the litigation," as was said in the Seaman case, "is not the test. * * * It is enough that he yielded to his adversaries the right he possessed to contest the will. That he has done, and the compromise itself proves *prima facie* an acknowledgment by the defendants that there was color for his objections." Page 381. The court will not ask "which party would have succeeded;" for that would involve the trial of the issue that was compromised, and the object of the law in encouraging compromises would thus be defeated. The consideration did not rest upon any advantage to the defendant, but upon the abandonment by Thomas Wright of his position as a contestant. By discontinuing his effort to overthrow the will, he relinquished a right secured to him by law, and lost his chance of inheriting the estate. He did this at the request of the defendant, who promised to pay for it. If the form of the promise had been to pay directly to Thomas Wright, no reason is perceived why it could not have been enforced. As the arrangement was made with him, and the consideration was furnished by him, the fact that the money was made payable by his direction to the plaintiff does not render the promise void. The plaintiff became his appointee, and upon receiving from him the written agreement, or evidence of the promise, it became his donee; and thus privity was established between the parties to the action. This is not the case of a mere stranger who attempts to intervene, and claim the benefit of a contract to which he is not a party, as in many of the authorities relied on by the appellant, because the promise was made directly to the plaintiff, and there was a clear intention on the part of the person furnishing the consideration to secure a benefit to the plaintiff. If the sum in question had been made payable to Thomas Wright, he could have

given the claim to the plaintiff, whose title would thus have been perfect; and why could he not make the gift by causing the promise to be made directly to the plaintiff? The intention of the parties should not be defeated by releasing the defendant from his promise, after he had received the consideration therefor, simply on account of the form of the transaction, which violates no statute, nor any rule of public policy.

If A sells a horse to B for $100, and B gives in payment therefor a note for that amount drawn payable to C at A's request, and A delivers the note to C, the latter can enforce it against the maker. The case supposed differs in no essential particular from that under consideration. As recently held by this court, after a careful review of the authorities, a party for whose benefit a promise is made may sue in assumpsit thereon even if the consideration therefor arose between the promisor and a third person. Todd v. Weber, 95 N. Y. 181, 194. Without elaborating our reasons, we think that the order appealed from should be affirmed, and that judgment absolute should be rendered against the defendant, with costs. * * *

HAMER v. SIDWAY.

1891. 124 N. Y. 538, 27 N. E. 256.

PARKER, J.—The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story II, on his twenty-first birthday, in the sum of $5,000. The trial court found as a fact that "on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. Story II that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story II, the sum of $5,000 for such refraining, to which the said William E. Story II agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise, and insists that it follows that, unless the promisor was benefited, the contract was without consideration—a contention which, if well founded, would seem to leave open for controversy in many cases whether

that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, foreborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. 444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent Comm. (12th ed.) 465. Pollock, in his work on contracts (p. 166), after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means, not so much that one party is profiting, as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such a forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. In Shadwell v. Shadwell, 9 C. B. (N. S.) 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, Charles Shadwell." It was held that the promise was binding, and made upon good consideration.

In Lakota v. Newton (an unreported case in the superior court of Worcester, Mass.), the complaint averred defendant's promise that "if you (meaning the plaintiff) will leave off drinking for a year I will give you $100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In Talbott v. Stemmons, 89 Ky. 222, 12 S. W. 297, the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249.

Pldg. Prom. for prom. in fact alleg. & consid. Pltf does not pay for cattle on delivery. Held need only aver readiness to pay as delivery was a cond. prec.

FUNK v. HOUGH ET AL.

1862. 29 Ill. 145.

THIS was an action of assumpsit, brought by the defendants here, as plaintiffs below, to recover against the plaintiff here, as defendant below, upon a special contract for the purchase and sale of cattle. Judgment by default was rendered against the defendant below for $2,192.50 damages, besides costs. From this judgment the defendant below appealed to this court.

BREESE, J.— * * * The objections taken to the special counts are not tenable. In both of them a consideration for the defendant's promise is formally set out, which was the promise and agreement of the plaintiffs to receive and pay for the cattle, which the defendant agreed to deliver; that they had paid a part of the price, and were ready and willing to take the cattle and pay for them, according to

the contract, of which the defendant had notice, but refused to deliver the cattle or return the money paid on them.

Promise for promise is a good consideration everywhere. The performance of the defendant did not depend on the prior performance of the plaintiffs. They were passive, only to act when the defendant should deliver the cattle. The delivery of the cattle, on or before a certain day, was a condition precedent to the performance of any act by the plaintiffs. When two acts are to be done at the same time, as where one agrees to sell and deliver, and the other agrees to receive and pay, in an action for the non-delivery it is only necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was at the place ready to deliver or not. Porter v. Rose, 12 Johns. (N. Y.) 208. That is this case.

Here the contract was to deliver the cattle, by a certain day, at Chicago, the defendant having the option to be paid as for gross weight or for net weight. The plaintiffs could not pay or tender the money until the weight, either gross or net, was ascertained, and that could be known only on delivery. All this was precedent to the payment or tender of the money. Hough v. Rawson, 17 Ill. 588. * * *

Judgment affirmed.

VOGEL v. PEKOC.

1895. 157 Ill. 339, 42 N. E. 386.

CRAIG, J.— * * * The evidence shows that plaintiff worked as a cooper for Nelson Morris & Co., and that there was a balance in their hands, for wages unpaid, of $25. The defendants, however, claim that the amount said to be due was forfeited, for the reason that plaintiff quit the services of defendants without giving two weeks' notice, as they claim he was required to do under a contract in writing which they put in evidence, as follows:

"This agreement, made and signed this 12th day of September, 1892, between Fairbank Canning Company and Nelson Morris & Co., the parties of the first part, and John Pekoc, the party of the second part:

"Witnesseth, the said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to said parties of the first part. And in consideration of such employment, and the peculiar nature of the business of the said first parties, and of the wages to be paid by the parties of the first part, the said second party agrees that he will not quit said service and employment without giving two weeks' notice, in writing, to said first parties of his intention so to do, and as a guaranty for the

faithful performance of this agreement on his part the said party of the second part agrees to deposit with said first parties the sum of $25, and in case of the violation of this agreement by said second party the said first parties shall retain said amount as liquidated damages, and in satisfaction and payment of all damages by them sustained. It is further agreed that the said first parties shall retain $2.50 per week of the wages earned by said second party until said sum of $25 shall be in their hands, to be held by them according to the terms of this agreement. JOHN PEKOC. (SEAL)

——————— (SEAL)

——————— (SEAL)

On the other hand, the plaintiff insists that the contract is void for the want of mutuality.

It will be observed that the written contract was not signed by the parties named therein as parties of the first part, and it is insisted by the plaintiff that as they failed to sign the contract it never became binding on him or any other person. The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part, as held in Johnson v. Dodge, 17 Ill. 433, and Short v. Kieffer, 142 *id.* 258. Regarding the contract in the same way, it would be treated as if it had been signed by the persons named as parties of the first part.

Good.

The next question to be determined is whether the contract is mutual. It is a general rule, well understood, that a contract between parties must be mutual. Weaver v. Weaver, 109 Ill. 225; Chitty Cont. 15; Bishop Cont., § 78, p. 32; Tucker v. Woods, 12 Johns. (N. Y.) 190. In the case last cited it is said: "In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent, and obligatory upon both at the same time." 1 Chitty 297; 1 Caines 583. In Chitty on Contracts, *supra*, the author says: "The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that if the one party never were bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality." In 1 Wharton Cont., p. 5, the author says: "The parties to a contract, therefore, must both be bound. Supposing that one promise in consideration of the promise of the other, the one is not bound unless the other is bound. A promise to do a thing on an executed consideration is not a contract; nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation no contract can be constituted. 'It is a general principle,' says Mr. Fry, 'that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other party, though

its execution in the latter way might in itself be free from difficulty attending its execution in the former.'"

Upon looking into the contract read in evidence, it will be found that the parties of the first part practically agree to do nothing, and there is substantially no obligation imposed upon them by the contract. The only portion of the contract claimed to impose any obligation on the parties of the first part is the following: "The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part." What obligation does this impose? When are they to employ the party of the second part? What sum are they to pay? How long is the employment to continue? Suppose they refuse to employ the party of the second part; can an action for damages be maintained for a breach of the contract? The answer to these inquiries is obvious. We think it is plain that the parties of the first part were not bound, under the terms of the contract, to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him he was without remedy in any court of the country. It may be true that the plaintiff might have entered into a contract which would require him to give two weeks' notice before he could quit the services of his employer without being liable to respond in damages, as might reasonably be provided in the contract; but no such case is presented by this record. Here the contract imposes no obligation on one of the parties, and hence it is void for want of mutuality. * * *

Ins. Co. ~~paid~~ paid loss 55 days before had to in Consid of plff releasing ½ the amt of loss. but Ss. should that neither side thought of the prepayment as a consid. Held: not good that the act must be in. Decided as Consid + not a mere happening.

FIRE INSURANCE ASSOCIATION v. WICKHAM ET AL.

1891. 141 U. S. 564.

IN this case the defendant below, within sixty days after proofs of loss, paid one-half the amount thereof and claimed a release of the other half.

BROWN, J.— * * * Assuming that the receipts upon their face show a complete settlement of the entire claim for one-half the total amount, what was the consideration for the release of the other half? The only one that is put forward for that purpose is that payment was made five days after proofs of loss were furnished or fifty-five days before anything was actually due by the terms of the policy. That the prepayment of part of a claim may be a good consideration for the release of the residues is not disputed; but is subject to the qualification that nothing can be treated as a consideration that is not intended as such by the parties. Thus, in

Fire case

Philpot v. Gruninger, 81 U. S. 14 Wall. 570, 577, it is stated that "nothing is consideration that is not regarded as such by both parties." To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In Kilpatrick v. Muirhead, 16 Pa. St. 117, it was said that consideration, like every other part of a contract, must be the result of agreement; the parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result following accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." See also, 1 Addison Cont. 15; Ellis v. Clark, 110 Mass. 389. Now, evidence of what took place at the meeting, if admissible for no other purpose, was competent as bearing upon the question whether the prepayment was mentioned or treated as an inducement or consideration for the release of the residue of the claim. It certainly was not so stated in the defendant's plea, which set forth that the defendant "paid to said plaintiffs a valuable consideration, to wit, the sum of $1,920.60, in full accord and satisfaction, etc., * * * for losses and damages by fire, at the several times in said plaintiffs' declaration set forth, * * * which valuable consideration or sum of money, so paid as aforesaid, was then and there accepted and received by said plaintiffs of and from said defendant in full payment, satisfaction, release and discharge of the said two policies of insurance, * * * and in consideration of said money so paid and received as aforesaid, said plaintiffs then and there released in writing the said defendant," etc. There is no mention here of the prepayment of this sum as a consideration for the release of the residue. The oral testimony upon this point was conflicting; the plaintiffs swearing that the committee stated that the companies were ready and willing to pay the cost of making repairs, and would waive any right they might have under the clause making the loss payable in sixty days from the time the proofs were furnished. There is no doubt that this right to delay payment was a stipulation which the insurer could waive at his option (Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 240), and if, as the plaintiffs stated, the insurance companies did exercise this option, and agree to waive their right to the sixty days, the prepayment cannot be regarded as a consideration to support the alleged compromise. It is a familiar doctrine that parol evidence is competent to show a want of consideration. 1 Greenl. Ev., §§ 284, 304.

The court charged the jury upon this point that the payment of the policy fifty-five days in advance of the time when the same would become due, without discount for interest, was by itself a sufficient consideration for waiving the plaintiffs' further claim in the policies, if it was understood as such.

The question was a proper one for the jury to pass upon, the charge was sufficiently favorable to the defendant, and their conclusion, whether correct or not, cannot be the subject of review here. * * *

Judgment affirmed.

Cont. Marriage is a good valuable consid for prom. & Prom. Cont. Void & fraud on cred. unless promisee is party to paid in fact.

PREWITT ET AL. v. WILSON.

1880. 103 U. S. 22.

FIELD, J.—On the 27th of April, 1866, Mrs. Josephine Prewit was a widow, only twenty years of age. Her husband was the late John Prewit. Not many months after his death another Mr. Prewit, Richard this time, proposed marriage to her. He was of mature age, being in his fifty-eighth year. His proposal was rejected. He renewed it and accompanied it with a promise to settle upon her, if she would consent to the marriage, a large amount of property. This promise moved her to consent. The deed of settlement was accordingly executed, and in May following the marriage took place. Both parties affirm that the marriage was the only consideration for the settlement, and it is so stated in the deed.

A little more than two years and a half afterwards, in December, 1868, the husband was adjudged to be a bankrupt in the district court of the United States for the northern district of Alabama, in proceedings taken upon his own application, and in the following months the plaintiff was appointed assignee of his effects, and to him an assignment was made. The present suit is brought by him to set aside the deed of settlement, on the alleged ground that it was executed by Prewit to defraud his creditors. * * *

When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.

Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes that "marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by unquiet or repose to the state; by what money ordinarily buys and by what no money can buy, to an extent

which cannot be estimated or expressed, except by the word infinite. To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth." And, also, that "marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value." Law of Married Women, §§ 775, 776. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an ante-nuptial settlement. Barrow v. Barrow, 2 Dick. 504; Nairn v. Prowse, 6 Ves. 752; Campion v. Cotton, 17 Ves. 264; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Herring v. Wickham, 29 Grat. (Va.) 628.

In Magniac v. Thompson, this court said that "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution." 7 Pet. (U. S.) 393.

The same doctrine is asserted by the supreme court of Alabama, in which state the parties to the deed of settlement reside and in which it was executed. Andrews v. Jones, 10 Ala. 400.

According to these authorities there can be no question of the validity of the settlement in this case. There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement.

It follows that the decree of the court below must be reversed, and the cause remanded with directions to dismiss the bill of complaint; and it is so ordered.

§ 15.—Adequacy of Consideration.

✓ WOLFORD v. POWERS, ADMINISTRATRIX.

1882. 85 Ind. 294.

ELLIOTT, J.—The appellant's complaint is founded upon a promissory note executed by the appellee's intestate. The answer of the appellee alleges that the only consideration for the note sued on was the sum of $40 paid to the intestate by the appellant, and the agreement of the latter to bestow upon one of his children the name of Charles Lehman Wolford. * * *

It is the general rule that where there is no fraud, and a party gets all the consideration he contracts for, the contract will be upheld. In Hardesty v. Smith, 3 Ind. 39, it was said: "When a party gets all the consideration he honestly contracted for, he cannot say that he gets no consideration, or that it has failed. If this doctrine be not correct then it is not true that parties are at liberty to make their own contracts." In Pollock's Principles of Contract, the author quotes approvingly from a philosophic treatise this statement: "The value of all things contracted for is measured by the appetite of the contractors, and, therefore, the just value is that which they be contented to give." An examination of the decided cases will prove this to be an unusually accurate statement of the law. In the case of Sturlyn v. Albany, 1 Cro. Eliz. 67, where the defendant promised the plaintiff that if he would show him a lease he would pay him a certain sum, the contract was held valid. The report of the decision reads thus: "But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." It is laid down in an old book that, "If A, in consideration that B will deliver to him a recognizance to read over, assumes and promises within six days to redeliver the same to B, or to pay him £1,000, this is a good promise, upon which B may have an action against A, for the consideration is sufficient." 1 Bacon's Abridgement, 420. In Bainbridge v. Firmstone, 8 A. & E. 743, the defendant promised the plaintiff that if he would allow him, the defendant, to weight certain boilers, he would return them within a reasonable time, and the consideration was held sufficient, Lord Denman saying: "The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive." In Haigh v. Brooks, 10 A. & E. 309, Lord Denman said, in speaking of the sufficiency of the consideration of a contract: "Both" (of the parties) "being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by dis-

covering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." This case came up on appeal and Lord Abinger, C. B., speaking for the court, said: "The actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents." Brooks v. Haigh, 10 A. & E. 323, 334. In the argument the case of Wilkinson v. Oliveria, 1 Bing. (N. Car.) 490, was cited, wherein it was held that the surrender of a letter would support a promise to pay £1,000. Turning from the English to the American courts, we find many illustrations of the principle under discussion. In Hempler v. Schneider, 17 Mo. 258, the consideration for the promise was the agreement that a third person should return to St. Louis within fifty days; and it was held sufficient, the court saying: "This court is not aware of any law which would justify it in releasing men from their lawful contracts, unless in cases of fraud, imposition, accident, or mistake in their creation. The plaintiff may have sustained no damages in consequence of Nauman not having returned in fifty days, but there was a sufficient consideration for his undertaking, and he must abide the consequences of his own bargain deliberately entered into." In Train v. Gold, 5 Pick. (Mass.) 380, it is said: "So if A promises B to pay him a certain sum of money, if he will call for it at a particular time, and B calls accordingly, the promise is binding, the calling for the money being a sufficient consideration. For any gain to the promisor or loss to the promisee, however trifling, is a sufficient consideration to support an express promise." The supreme court of South Carolina said: "Every man was free to make a contract, and free to refuse it; but when once made, he was bound by it, where there was no fraud, concealment, or latent defect. * * * Inadequacy of consideration is not alone any ground for setting aside a contract solemnly entered into." Whitefield v. McLeod, 1 Am. Dec. 650.

In Earl v. Peck, 64 N. Y. 596, a case similar to this in many respects, the court says: "The only point insisted upon in this court relates to the consideration. The note is for $10,000, and expresses the consideration to be for services rendered. The plaintiff had been a housekeeper for the defendant, who was a bachelor, for seven or eight years, and the latter was indebted to her for her services in some amount, and the evidence tended to prove that at some time during the service it was agreed that the amount of compensation should be left to the intestate. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud, or undue influence, is not a defense to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in

amount, the note is a valid obligation. * * * There is no standard whereby courts can limit the measure of value in such a case, and an obligation is not wanting even partially in consideration because the value is less than the obligation."

The case before us, in some of its features, resembles that of Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428, where a note for services was sustained although the amount was $20,000, and greatly in excess of the value of the services. The court said: "Mere inadequacy in value of the thing bought or paid for is never intended by the legal expression, want or failure of consideration. This only covers either total worthlessness to all parties or subsequent destruction, partial or complete." The case of Lindell v. Rokes, 60 Mo. 249, S. C., 21 Am. Rep. 395, is a peculiar one. There the consideration of the note sued on was the payee's promise to abstain from the use of intoxicating liquors for eight months; and it was held to be sufficient to support the note. * * *

There are, it is commonly but not altogether accurately said, two exceptions to the general rule we have stated:

First. Where the sole consideration is money, and the amount is greatly disproportioned to the value of the promise.

Second. Where the consideration is so grossly disproportionate to the value of the promise as to indicate fraud, shock the conscience of the court, and make the enforcement of the contract unconscionable.

Of these in their order:

First. A money consideration is capable of exact and definite admeasurement; its value is fixed and unalterable, and there cannot be any uncertainty as to its adequacy or inadequacy. The parties really exercise no judgment in passing upon its value, for that never is in doubt. Courts can, therefore, pass upon its sufficiency without infringing the rule that where the parties have for themselves determined the sufficiency of the consideration, courts will not review their decision. Schnell v. Nell, 17 Ind. 29; Shepard v. Rhodes, 7 R. I. 470. But where the consideration is something else than money, there must be some exercise of judgment in ascertaining and settling its value.

Second. Where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties in fixing it. But it will be found upon an analysis of the cases that courts interfere upon the ground of fraud, and not upon the ground of inadequacy of consideration. The courts never do interfere unless the consideration is so grossly inadequate as to amount to fraud or oppression. Mr. Pomeroy has given the subject careful investigation, and concludes his discussion with this remark: "Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief." 2 Pomeroy Eq. Jur., § 927. Judge Story is

still more emphatic in his statement of the rule. "Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, and profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon. Inadequacy of consideration is not, then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract." 1 Story Eq. Jur., §§ 244, 245. * * *

The surrender, at the intestate's request, of the right or privilege of naming the appellant's child, was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent. If the intestate chose to bargain for the exercise of this right, he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for declaring that the right with which the father parted at the intestate's request was of no value.

It is difficult, if not impossible, to invent even a plausible reason for affirming that such a right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right. The rule is, that "It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking." Addison Cont., § 9; Glasgow v. Hobbs, 32 Ind. 440. Conceding that the intestate derived no benefit, still, as the appellant suffered some detriment and yielded a right, there is a legal consideration.

The concession that the intestate secured no benefit is one that cannot be justly made, for he himself determined that the act done by the appellant, at his request, was a benefit to him. It is not necessary that the consideration for a promise should be a property one. It is true that the courts and text-writers use the words "valuable consideration," but this is done for the purpose of distinguishing the consideration from a good one, that is, one based upon love and affection, and from one resting on a purely moral obligation. "It is a familiar doctrine," says the supreme court of Texas, in Hendricks v. Snediker, 30 Tex. 296, "that there need be no pecuniary benefit passing to the vendor to make a consideration valuable." In most of the cases cited in discussing the first branch of this case, the con-

sideration was something else than one having a pecuniary or property value. Others may be added. Thus, in Gurvin v. Cromartie, 11 Ired. (N. Car.) 174, the consideration was the undertaking of the plaintiff to take a wife and have a child born unto him. In Adams v. Honness, 62 Barb. (N. Y.) 326, the consideration was the removal of the promisee to a place near the home of the promisor; and this was also the consideration in Halsa v. Halsa, 8 Mo. 303, and Rumbolds v. Parr, 51 Mo. 592. In Worrell v. First Presbyterian Church, etc., 23 N. J. Eq. 96, the consideration was the resignation of the position of pastor of a church. In Anson on Contracts, 64, cases are collected upon this general subject, and the author says that courts "will not ask whether the thing which forms the consideration does in fact benefit the promisor, or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him." We find scattered through the books cases where devises of property are made upon conditions having no pecuniary value at all, and yet they are always enforced; and so we find men in life making subscriptions to colleges on condition that they shall bear their names, or endowing professorships upon condition that they shall be given their names, and, so far as our observation has extended, the validity of such conditions has never been challenged. It is evident that the naming of a college, professorship or the like has always been considered as a matter of importance and value, for to declare otherwise would be to affirm that courts and law-writers have for ages been solemn respecters of worthless trifles. It will not do to say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then, in the absence of fraud or oppression, it must be held to possess the value placed upon it by the contracting parties.

Cases are cited showing the importance of the question of consideration where fraud and imposition are imputed to the party asserting the contract, and to the rule declared in those cases we yield undoubting assent. But here there is no question of fraud, imposition or oppression. * * *

Eq. Rule as to inadequate
Consid in Eq.

McARTEE v. ENGART.

1851. 13 Ill. 242.

TREAT, C. J.—* * * As a general principle, inadequacy of price is not a sufficient ground for setting aside a conveyance of property. A court of equity, in the exercise of a sound discretion, may refuse to decree the specific performance of an agreement founded on an insufficient consideration; but it will not rescind an

executed contract merely because the consideration was inadequate. Osgood v. Franklin, 2 Johns. C. R. (N. Y.) 1; Low v. Barchard, 8 Ves. 133; Wood v. Abrey, 3 Mad. 417; Naylor v. Winch, 1 Simmons & Stuart, 555. There may be cases where the court will interfere on the ground that the price is so inadequate as to afford decisive evidence of fraud or undue influence. But to produce such a result, the inequality must be so gross and palpable as to shock the conscience, and convince the judgment that there has been imposition or oppression. 1 Story's Eq., § 246; Underhill v. Norwood, 10 Ves. 209; Copis v. Middleton, 2 Mad. 566; Stillwell v. Williams, 1 Jac. 280. * * *

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§ 16.—Abandonment of a Right or Forbearance to Exercise It.

HARRIS v. HARRIS.

1899. 180 Ill. 157, 84 N. E. 180.

CRAIG, J.—This was an action of assumpsit, brought in the superior court of Cook county by defendant in error, against plaintiff in error, to recover upon a promissory note which reads as follows:

"CHICAGO, Jan. 2, 1890.

"Eight months after date I promise to pay to the order of Isaac Harris $1,605, at my office, with interest at seven per cent per annum, value received. ABRAHAM HARRIS."

Due, 9—5, '90.

To the declaration the defendant pleaded two pleas: First, non-assumpsit; and second, want of consideration. A trial before a jury resulted in a verdict and judgment for the plaintiff for the amount of the note and interest. The defendant appealed to the appellate court, where the judgment was affirmed, and for the purpose of reversing the latter judgment this writ of error was sued out.

It appears from the record that Moses Harris, father of Abraham Harris, was indebted to Isaac Harris in the sum of $1,605 for borrowed money. At the time the note was given Moses Harris, owing to some financial trouble, had placed in the name of Abraham Harris a large amount of property, and being indebted to Isaac Harris he requested Abraham Harris to execute and deliver to Isaac Harris his note for the amount of the indebtedness so owing by Moses Harris. Pursuant to such request the note in suit was executed and delivered to Isaac Harris by plaintiff in error, Abraham Harris. * * *

In Underwood v. Hossack, 38 Ill. 208, it was held that an extension of time for the performance of an agreement or for the payment of a debt forms a sufficient consideration to support a contract. In Daniel on Negotiable Instruments (3d ed., § 185) the author lays

down the rule that where the debt of a third person is due and a note is taken payable at a future day there will be an implied agreement for delay. In Parsons on Notes and Bills (vol. 1, ch. 6, 2d ed., 195) the author says: "A debt from a third person is, in general, a good consideration for a note. It certainly would be so if a delay in calling in the debt entered expressly into the bargain. Perhaps if the debt were payable at once and the note payable at a future day, or if both were payable in future and the note on the longest time, such agreement for delay would be implied." In Thompson v. Gray, 63 Me. 228, it was expressly held that the suspension of the right of a creditor to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it. Here the time for the payment of the debt was extended eight months and the note of the plaintiff in error was accepted for the indebtedness payable eight months after date, and under the rule established by the authorities cited there was ample consideration for the note. Moreover, if plaintiff in error gave the note in satisfaction of the debt due from Moses Harris to Isaac Harris, and it was accepted by Isaac Harris in satisfaction of such indebtedness, the agreement so to accept it was a sufficient consideration for the note. After the note in question was taken, no effort whatever, so far as appears, was made to collect the debt of Moses Harris, but defendant in error relied upon Abraham Harris, and the latter recognized his liability to pay. There was, therefore, ample evidence to support the claim that the note in question was taken and accepted in satisfaction of the debt due from Moses Harris.

The note having been given upon a sufficient consideration, the judgment of the appellate court was correct, and it will be affirmed.

BALLARD v. BURTON.

1892. 64 Vt. 387, 24 Atl. 769.

PLAINTIFF presented for payment a certificate of deposit of a bank which was insolvent, but which had money on hand sufficient to pay the certificate. The bank officers requested plaintiff to leave the money in the bank, and he did so in consideration of his receiving another certificate, signed by defendant, in place of the one he presented. It was not expressly agreed how long plaintiff should forbear to exercise his right to cash this certificate, but he did so forbear for a reasonable time.

START, J.— * * * It is insisted that the defendant's promise was without consideration, because no time of forbearance was agreed upon. A promise to forbear and give further time for the

payment of a debt, although no certain or definite time be named, if followed by an actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise to pay the debt by a person other than the debtor. King v. Upton, 4 Me. 387; Elton v. Johnson, 16 Conn. 253; Howe v. Taggart, 133 Mass. 284; Prouty v. Wilson, 123 Mass. 297; Robinson v. Gould, 11 Cush. (Mass.) 55; Moore v. McKenney, 83 Me. 80, 21 Atl. 749. In Howe v. Taggart, *supra,* Field, J., in delivering the opinion of the court, says: "It seems to have been assumed in this commonwealth that an agreement to forbear bringing suit for a debt due, even although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise." In Moore v. McKenney, *supra,* decided by the supreme court of Maine in 1890, the defendant wrote his name upon the back of the note declared upon, intending thereby to guaranty its payment. He did this in consideration of the plaintiff's promise to forbear and give further time for the payment of the note; no time of forbearance was agreed upon; and it was held that the court properly ordered a verdict for the plaintiff. Walton, J., in delivering the opinion of the court, says: "If the promise is in general terms, no particular time being named, the law implies that the forfearance shall be for a reasonable time. Such is the legal construction of such a promise. The debtor, therefore, by such promise, does obtain a right, not only to some delay, but to a reasonable delay; such, as, under all the circumstances, he is reasonably entitled to." In King v. Upton, *supra,* the promise counted on was to pay the debt of another, in consideration that the creditor would "forbear and give further time for the payment of the debt," naming no time. The plaintiff averred that he did thereupon forbear, and the consideration was held sufficient. In Calkins v. Chandler, 36 Mich. 320, it is held that an agreement to pay the debt of another in consideration that the creditor would forbear and give further time for payment is founded upon a good consideration, although no definite time of forbearance is named. In Hakes v. Hotchkiss, 23 Vt. 235, it is said: "If no agreement be made as to the length of time during which the promisee will forbear, the law will presume that he undertakes to forbear for a reasonable time; and this is sufficiently certain, and is a good consideration." Parsons, in his work on Contracts (Volume I, p. 442), says: "Nor need the agreement to delay be for a time certain, for it may be for a reasonable time only, and yet be sufficient consideration for a promise." * * *

Held, that there was a consideration which would support defendant's liability on the certificate of deposit signed by him.

§ 17.—Compromise of a Disputed Claim.

MELCHER v. INSURANCE COMPANY.

1903. 97 Me. 512, 55 Atl. 411.

WISWELL, C. J.—By a policy of insurance dated January 13, 1897, the defendant company insured one Simon P. Baker against loss by fire upon his dwelling house, for a period of three years from that date, in the sum of $500. By the same policy the furniture therein was also insured. At that time Baker was the owner of the property, real and personal, covered by the insurance, but the real estate was subject to a mortgage to one Caldwell. The policy contained a provision to the effect that it should become void if the property insured be conveyed without the assent in writing of the insurer. January 7, 1898, while the policy was in force, Baker conveyed the real estate to his wife, Dorothy A. Baker, but the policy was never assigned, and no notice was given to the insurance company, or its agent, of this conveyance. On January 8, 1898, Mrs. Baker mortgaged the premises to Richmond L. Melcher, the plaintiff, and on August 2, 1899, during the period of time covered by the insurance policy, the dwelling house was entirely destroyed by fire. * * *

This action is not brought by the insured, nor by the owner of the equity of redemption, upon the policy, but by Melcher, the mortgagee, to recover upon a promise alleged to have been made by the defendant corporation to pay him the sum of $400, made after the destruction of the buildings by fire. * * *

The question is as to whether or not there was any consideration for this promise. The plaintiff's contention is, as shown by his declaration, that the offer was made and accepted as a compromise of the plaintiff's claim against the company. It is abundantly well settled that the compromise of a doubtful claim is a sufficient and valid consideration for a promise to pay money for the settlement of such claim. It is immaterial upon which side the right ultimately proves to be, provided the parties believe, at the time of the compromise, that there is a doubtful question involved, and, for the purpose of settling the dispute and of preventing litigation, one of the parties to the controversy promises to pay a sum of money in compromise of such doubtful claim, which offer is accepted by the other party.

But in order for such a compromise to constitute a sufficient consideration for the promise, it is necessary that the parties should at least have supposed, at the time of the compromise, that the validity of the claim made was doubtful, either because of a question as to what facts might be susceptible of proof, or of a doubt as to the law applicable thereto. The claim must be one that is made in good faith, with a belief by the claimant that there is some chance of its

successful enforcement. The surrender of a mere groundless claim, which is known by both parties to be unenforceable, is not a sufficient consideration. This limitation of the rule is recognized by all the decisions upon the subject, a few of which only we cite. Allis v. Billings, 2 Cush. (Mass.) 25; Kidder v. Blake, 45 N. H. 530; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Bellows v. Sowles, 55 Vt. 391, 45 Am. Rep. 291; Smith v. Farra, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115.

In this case we do not think that the offer relied upon by the plaintiff was made for the purpose of effecting a compromise, or that there was any doubt whatever as to the claim made by the plaintiff against the insurance company, if he made any claim. The plaintiff could not have supposed that he had any chance of successfully maintaining a suit against the company upon the contract of insurance. It cannot be believed that, under the circumstances of this case, he would have commenced any action against this company, if the offer had not been made. We do not think that he made any claim to recover the insurance, as a matter of legal right. He simply sought a gratuity from the company because of the fact of the previous insurance. Nor could the insurance company have supposed, in making this offer, that it was attempting to settle a doubtful claim. The company and its agent must have known that no claim could be enforced against it, and that there was no danger of its being involved in litigation. The first letter of the agent to the plaintiff, after he had become aware of the fact of the transfer of the property, clearly states the fact, about which there was no question, that "the conveyance of this property to his wife, of course, vitiates the policy without transferring it." There is no suggestion in any of the correspondence that this was an offer of a compromise. Upon the contrary, the whole correspondence shows that the agent was endeavoring to get the company to pay, notwithstanding that there was no liability, and the offer made by the company, through its agent, was not to pay a sum of money for the sake of settling a claim about which there was any question or doubt, but to pay the full cash value of the property destroyed, according to its estimate of such value. The case does not come within the limitation to the rule, above stated, that the parties must at least have believed that there was some doubt as to the validity of the claim.

Under these circumstances we are forced to the conclusion that the promise sued in the plaintiff's writ was not a binding and enforceable one, because it was made without any consideration whatever. According to the stipulation of the report, the entry will be:

Judgment for defendant.

GATES v. SHUTTS.

1859. 7 Mich. 127.

DEFENDANT charged complainant with intentionally burning his own mill and made claim for payment for certain wheat of defendant which had been placed in the mill before it was burned, and complainant gave his note and mortgage for the value of the wheat. Complainant filed bill to set aside these securities. Bill dismissed. Appeal.

MANNING, J.—* * * If the mill was burnt by Gates, or by his procurement, Shutts should be paid for his wheat; otherwise not. His right to have Gates pay him for the wheat depends on that fact. But it is not necessary for us to find this fact or grant the relief asked; for the parties have themselves settled the only difficulty between them; that is, whether Gates should pay Shutts for the wheat; and that settlement must stand, if there was no fraud, or undue advantage taken by Shutts to bring it about, and he had reason for believing the truth of the charge, and did not manufacture it to frighten Gates into a settlement. A *bona fide* claim, with a color of right, although there be in fact no right, so long as the party asserting it does not know he has no right, and acts in good faith, is sufficient to sustain a compromise; for a party may buy his peace in a case in which he knows there is no right against him.

There would be no such thing as a compromise or settlement of a dispute by the party if the original controversy was not thereby closed. * * *

Decree affirmed.

STOEHLKE v. HAHN.

1895. 158 Ill. 79, 42 N. E. 150.

BAILEY, J.—This was a bill in chancery, brought by Francis Stoehlke and others, members and policy holders in the Addison Farmers' Mutual Insurance Company, against the company and its officers and one Mathias Hahn, to restrain the payment and collection of an order for $750 drawn on the treasurer of the company in favor of Hahn. * * *

On the 24th day of October, 1881, Hahn became a member of the company by insuring therein, his policy being for the sum of $1,300, covering a barn and certain personal property, and running for the term of five years from that date. It therefore expired, by its terms, October 24, 1886. On Friday, October 28, 1886, an agent of the

company called at Hahn's house during his absence, in relation to having the policy renewed, and had an interview with Hahn's wife, in which, as was afterwards claimed, an oral contract was made continuing the insurance in force until Hahn should subsequently go to the agent's office and have the policy formally issued. On October 31, 1886, and before Hahn had been to the agent's office in relation to the insurance, the property insured was totally destroyed by fire. Hahn shortly afterwards filed his proofs of loss, and presented to the company his claim for $1,300—the full amount of his policy. The presentation of the claim seems to have created some ill-feeling among the other policy holders, and the matter was accordingly brought before the next annual meeting of the members of the company, which was held January 8, 1887. At that meeting the claim was brought up for consideration, and was referred to a committee of five to examine and report, and the committee, after examining it, reported recommending the payment of $1,000 in full of the claim. The meeting, on considering the report, adopted an amendment reducing the sum to be paid to $750, and the report, as thus amended, was adopted by a small majority of the members present. * * *

On February 7, 1887, the complainants filed their bill for an injunction restraining the company and its officers from paying the order thus given to Hahn. An injunction *pendente lite* having been awarded, Hahn, who seems not to have been made a defendant to the original bill, brought his suit at law against the company for the recovery of the amount of the order, and thereupon the complainants filed their supplemental bill, making Hahn also a defendant, and praying for an injunction restraining the prosecution of the suit at law. On that bill an injunction *pendente lite* was also issued as prayed for. By stipulation of the parties, the sum of $112.50 was allowed as damages on dissolution of these injunctions, and no question is raised upon this appeal as to the propriety of such allowance.

Counsel for the appellants insist that as Hahn's policy had expired, and as no new policy had been issued to him or even agreed upon, he had not even an apparent claim against the company, and that there was nothing, therefore, bringing the case within the rule laid down by Lord Hardwicke in Stapleton v. Stapleton, 1 Atk. 10, and since that time re-affirmed by the courts in numerous decisions; that an agreement entered into upon a supposition of a right or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement. See also, Moore v. Fitzwater, 2 Rand. (Va.) 442; Creutz v. Hill, 89 Ky. 429; Bennett v. Paine, 5 Watts (Pa.) 259; Mulholland v. Bartlett, 74 Ill. 58; 1 Parsons on Contracts, 439.

We are of the opinion that if there was not a clear legal right on

the part of Hahn to recover $1,300 (the full amount of his insurance), there was a doubtful right, which was a sufficient foundation for an agreement of compromise. That right was based upon the oral agreement made by the agent of the company with Hahn's wife for a renewal of the insurance, she acting in the transaction as Hahn's agent. It is true, no previous agency is proved; but the evidence is clear that shortly after the transaction it was reported by her to her husband, and was then and there approved and ratified by him; and the rule is a familiar one, that a subsequent ratification of a contract by an assumed agent has the same effect as an antecedent authority. * * *

Reference is made to the provision of the company's charter providing that policies of insurance, before becoming binding on the company, shall be signed by the president and countersigned by the secretary. The rule that an oral agreement for insurance may be valid is sustained by the authorities, and it is, to say the least, doubtful whether the foregoing provision of the charter can have any application to oral contracts. By its terms it applies only to policies, which are formal written contracts of insurance, and oral contracts, of course, are incapable of being signed or countersigned. * * *

Decree dismissing bill affirmed.

WILEN'S APPEAL.

1883. 105 Pa. St. 121.

PAXSON, J.— * * * The parties to this agreement were all *sui juris,* and the instrument was under seal. There is no allegation of fraud, and the contract is not obnoxious to any law or rule of public policy. It was a lawful agreement between parties able to contract. The object of it is expressly stated to be "to avoid the expense of litigation incident to the determination of the rights of the parties under said will." The settlement of family disputes has been repeatedly held to be a sufficient consideration to support a contract. The law is thus laid down by Mr. Bispham in his work on Equity, at page 192: "And family compromises, especially if they are made in good faith and with full disclosure, are favored in equity, and may be sustained by the court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers." It was said by Thompson, J., in Walworth v. Abel, 2 P. F. S. 370, that "Family arrangements are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or any other for them." See also Burkholder's Appeal, decided at the present term (*ante,* 31). We might

multiply authorities upon this point, but the law is too well settled to require it. * * *

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§ 18.—Delivery of Property in Trust.

JENKINS v. BACON.

1873. 111 Mass. 373.

THE plaintiff, on the point of starting upon a long voyage, requested the defendant to buy a government bond and keep it for him. The defendant was to receive nothing for his services. The defendant bought the bond, and after keeping it a year, sent it by mail to the plaintiff's wife, and it was lost on the way. Neither the plaintiff nor his wife requested the defendant to send the bond to her.

AMES, J.— * * * In this instance, the transaction was more than a simple deposit for safe keeping. The plaintiff claimed, and there was evidence, which was not contradicted or rebutted, to the effect that the defendant was to collect the coupons as they became due, for the benefit of the plaintiff's wife. The bond was delivered to the defendant in trust; he accepted the trust and entered upon its performance. "The owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management." Lord Holt, C. J., in Coggs v. Bernard, 2 Ld. Raym. 909. Notwithstanding the gratuitous character of the bailment, "it is held that the bailor has a remedy, in an action *ex contractu,* if the bailee do not perform his undertaking, and that there is a sufficient consideration to support a contract." Metcalf Con. 164 and cases there cited. In Robinson v. Threadgill, 13 Ired. (N. Car.) 39, it was held that if one undertakes to collect notes for another, without mentioning any consideration, and takes the notes for that purpose, there is a sufficient legal consideration for the engagement. A mere agreement to undertake a trust *in futuro* without compensation is not obligatory; but when once undertaken and the trust actually entered upon, the bailee is bound to perform it according to the terms of his agreement. Rutgers v. Lucet, 2 Johns. Cas. (N. Y.) 92; Smedes v. Utica Bank, 20 Johns. (N. Y.) 372, 379. Upon this point the authorities are numerous. * * * And it is well settled that the remedy is not confined to an action of tort, but that contract will lie. * * *

§ 19.—Blood or Natural Affection.

FINK v. COX, EXECUTOR.

1820. 18 Johns. (N. Y.) 145.

SPENCER, J.—The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff. * * *

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is, undoubtedly, a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed against all persons but creditors and *bona fide* purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss or prejudice of the promisee. The note here manifested a mere intention to give the $1,000. It was executory, and the promisor had a *locus poenitentiae*. It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money or a chattel, that such a promise can be enforced at law.

Judgment for defendant.

DODGE v. ADAMS.

1837. 19 Pick. (Mass.) 429.

ASSUMPSIT for boarding the defendant's two minor children during the pendency of a libel for divorce a *mensa et thoro*, filed against the defendant by his wife, who was the daughter of the plaintiff. Trial before Putman J. A verdict was returned for the plaintiff, subject to the opinion of the whole court.

DEWEY, J.—The plaintiff relies upon an express promise by the defendant to pay for boarding his minor children. This promise was made after all the expenditures, for which compensation is now de-

manded had been incurred, and the defendant says that it was *nudum pactum;* that no damage having been sustained by the plaintiff and no benefit having accrued to the defendant in consequence of the promise, it is a promise without any consideration and of no validity.

To this the plaintiff replies, that the defendant was under a moral obligation to support his minor children, and that this moral obligation was a sufficient consideration for an express promise.

If the term moral obligation be used in its more extended sense, as embracing the whole circle of moral duties, and more especially if it include those imperfect obligations which the divine law enjoins, but which human laws do not reach, the plaintiff might well say that the defendant was under a moral obligation to contribute, within the extent of his means, at all times for the necessities of his children and even beyond the limits of their minority. But is this that kind of moral obligation which constitutes a legal foundation for an express promise? To constitute a moral obligation the consideration for an express promise which may be enforced in a court of law, there must have been some pre-existing legal obligation. This legal obligation may have ceased to have force by reason of some statute bar, as in the case of the statute of limitations, but there having been once a legal obligation, the moral obligation is sufficient to revive the liability by means of a new promise.

This subject was much considered by this court in the case of Mills v. Wyman, 3 Pick. (Mass.) 207. That was a case where an adult son of the defendant, being in distress and in need of relief at a distance from home, was supplied by the plaintiff, and the plaintiff gave notice of the same to the father, who thereupon promised in writing to pay the expenses thus incurred. The plaintiff claimed to recover, on the ground that a moral obligation was a sufficient consideration for an express promise; but the court, after full consideration of the question and the authorities bearing on it, held the consideration insufficient and the promise not binding in law.

The principles of that case clearly establish the position that the mere relationship between the defendant and his children did not *per se* furnish evidence of that degree of moral obligation sufficient to maintain an action on the express promise. The legal principles of that case have been fully sanctioned in the case of Cook v. Bradley, 7 Conn. 57. Does the fact that in the case now under consideration the children were minors necessarily change the nature of the consideration? Is there a legal obligation on the father to pay the expenses of supporting his minor children in all places and under all circumstances, or is it an obligation somewhat limited in its character? The general obligation of furnishing reasonable and adequate support for his children during the period of their infancy, is clearly by law devolved on the parent; but he has the right of providing for them under his own roof and in such a way as he may find most convenient and least burdensome to himself. It is well settled

that if a child voluntarily leaves his father's house and without any sufficient occasion therefor, the father is not bound to provide for him elsewhere. In the language of the case of Angel v. McClellan, 16 Mass. 28, whenever the authority of the parent shall be abjured without any necessity occasioned by the parent, all obligation to provide for the child has ceased. It would be no less true that where the child was induced by another person to leave the family of the father without any necessity for so doing, the person thus influencing him to leave would, in case he should furnish supplies, have no cause of action against the father. It is also very clear that the liability of the parent for support furnished his children, does not always arise when his children have been provided for by others, although in so doing they have actually benefited the parent.

It becomes necessary, therefore, in each case to ascertain under what circumstances the supplies were furnished, before we can decide whether there was a sufficient consideration to create a liability on the part of the parent to pay for them. Upon looking into the report of facts in the present case, it is apparent that the plaintiff relies solely upon the ground that these supplies were furnished by him for the children of the defendant, and that the defendant subsequently promised to pay what the same were reasonably worth. The plaintiff does not show that any necessity existed for his interference, any want of full and adequate provision for the children at the house of their father, or any facts tending to prove that it was necessary to maintain them elsewhere. So far as it appears in the case they left without the consent of the father, and without any fault on his part. There is an entire absence of all those circumstances that would create such an obligation as would furnish a legal consideration for an express promise. The proof of such facts must come from the plaintiff. The burden is on him to show that there existed a necessity for furnishing these supplies, and that this necessity was occasioned by the defendant. The plaintiff having failed to do so, has furnished no sufficient evidence to maintain his action. The promise of the defendant was merely gratuitous and cannot be enforced in a court of law.

The verdict is set aside, and the plaintiff is to become nonsuit.

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§ 20.—Promise to Perform What is Impossible.

Performance is deemed to be impossible in itself when it is impossible "according to the state of knowledge of the day." See Clifford v. Watts, L. R. 5 C. P. 588.

As in the case of a promise to go from London to Rome in three hours. The Harriman, 9 Wal. (U. S.) 172.

BENNETT ET AL. v. MORSE.

1894. 6 Colo. App. 122, 39 Pac. 582.

SIXTEEN persons signed a contract attached to a note of W, which recited that the note "is secured by attached certificate of stock No. 44" of a specified corporation "for 5,000 shares of the par value of $20 each"; and that if the note for $2,500, with interest, is not paid by W when due, "we will each purchase of the above-attached stock 400 shares, and pay therefor in cash 50 cents per share."

Action by Horace W. Bennett and Julius A. Meyers against Fred C. Morse to recover damages for breach of contract. There was a judgment sustaining a demurrer to the petition, and plaintiffs bring error.

THOMPSON, J.—* * * By the averments of the complaint the parties signing the instrument were not in any sense sureties. They did not agree to pay the debt. They simply agreed to become purchasers, each of a certain portion of the thing pledged, in case an enforcement of the pledge should become necessary. They did not agree that the amount due should be divided into sixteen equal parts, and that each should purchase a sufficient amount of the stock at the price named to pay one part. Their contract was that they would purchase 400 shares, no more and no less, of the stock pledged, at 50 cents per share. This contract, and not the parties to it, was received as security. A purchase involves an acquisition. The purchaser is entitled to the thing purchased. There are two parties to a purchase—a vendor and a vendee—and, upon the payment by the vendee to the vendor of the purchase price, an obligation rests upon the latter to transfer to the former the subject of the sale. An agreement to purchase implies, even if it does not express, an agreement to deliver the thing purchased, so that, if the purchaser can be held to his purchase, the seller can be held to the delivery of that which was purchased. Accordingly the parties to this agreement, upon payment for their stock, were entitled to have it transferred to them, and the plaintiffs could not enforce payment for it without making it over to them. The plaintiffs recognized this necessity, for they aver a tender of the stock to the defendant when the money was demanded. The contract was unilateral, but the plaintiffs, by seeking its enforcement against the defendant, have made it mutual to the extent of assuming as to him the obligation of vendors. The agreement is, in form, joint. It is the agreement of all that each shall purchase stock. Upon default by one all would become liable; and, but for the code provision any suit upon the agreement must be brought against all its makers. That provision is as follows: "Sec. 13. Persons jointly or severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of

them be included in the same action, at the option of the plaintiff." Sess. Laws 1887, p. 99. This section does not purport in any wise to alter the obligations which parties have assumed in their contracts. It does not make a contract valid which would otherwise be invalid. It operates merely as an enlargement of the remedy upon the contract, permitting suit to be brought against any of the parties liable or against all, at the plaintiff's pleasure. But where parties contract jointly there must be a joint liability in order that there may be a several liability. If a joint agreement is invalid or incapable of enforcement against all of its makers, it is invalid and incapable of enforcement against any one or more of them. In this case sixteen men agreed to purchase 400 shares each, making a total of 6,400 shares, to come out of one certificate—No. 44—for 5,000 shares. As shown by the complaint, this is the exact contract which the parties made, and it is not in our power to vary it. If they had been jointly sued, the plaintiffs must have been ready to deliver to them 6,400 shares; but there were only 5,000 shares from which they could be taken. Such a contract is inherently absurd. The parties could not purchase and the plaintiffs could not deliver 6,400 shares from 5,000 shares. Mr. Bishop says: "A mutual undertaking between parties to do what both know to be impossible is vain and idle, lacking the elements of a contract, and no suit can be maintained upon it." Bish. Cont., § 579. See also, Chit. Cont. (11th Am. Ed.) 64, note; Faulkner v. Lowe, 2 Exch. 595; Gilmer v. Gilmer, 42 Ala. 23. If the agreement had by its terms been several, a recovery could have been had against each of the parties as long as the stock remained unexhausted, because his agreement was complete in itself, and independent of that of the others; but, the contract being joint, and, as a joint contract, being upon its face impossible of performance, it is void, and no action is maintainable upon it against all or any of the parties to it. It is the case made by the complaint that is here passed upon. Whether in some other form of action, or under averments which are wanting in this complaint, the plaintiffs may not have a remedy against the signers of the instrument, it is not in order now to express an opinion.

Judgment affirmed.

STEVENS v. COON.

1843. 1 Pin. (Wis.) 356.

DUNN, C. J.—Error is brought in this case to reverse a judgment of the district court of Jefferson county.

Coon, plaintiff below, brought his action of assumpsit against Stevens, defendant below, to recover damages on a liability growing out of a contract, which is in the words, etc., following, viz.:

"ASTOR, March 23, 1839.

"In consideration of C. J. Coon entering the west half of the northwest quarter of section 35, in town 13, range 13, I bind myself that the said eighty acres of land shall sell, on or before the 1st of October next, for two hundred dollars or more, and the said Coon agrees to give me one-half of the amount over two hundred dollars said land may sell for in consideration of my warranty.

"HAMILTON STEVENS."

"I agree to the above contract. C. J. COON."

* * * Under the construction put on the contract read in evidence, the jury found for the plaintiff $116.50 in damages, and judgment was entered thereon. There is manifest error in this decision of the court. From an inspection of the contract, it is obvious that it is not such an one as is obligatory on either party. There is no reciprocity of benefit, and it binds the defendant below to the performance of a legal impossibility, so palpable to the contracting parties, that it could not have been seriously intended by the parties as obligatory on either. The undertaking of the defendant below is, "that plaintiff's tract of land shall sell for a certain sum by a given day." Is it not legally impossible for him to perform this undertaking? Certainly, no man can, in legal contemplation, force the sale of another's property by a given day, or by any day, as of his own act. The plaintiff was well apprised of the deficiency of his contract on the trial, as the testimony of his witness was entirely apart from the contract sued on, and was directed in part to a different contract, and such a one as the law would have recognized. If the contract had been that the tract of land would be worth $200 by a given day, then it could have been recovered on, if it did not rise to that value in the time. 1 Comyn on Contracts, 14, 16, 18; Comyn's Dig., Title "Agreement"; 1 Pothier on Obligations, 71; 6 Petersdorf's Abridg. 218; 2 Sand. (N. Y.) 137 (d). The district court should not have entered judgment on the finding of the jury in this case. The construction of the contract by the district court was erroneous.

Judgment reversed.

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§ 21.—Promise to Do, or Actually Doing, What One is Legally Bound to Do.

RUNNAMAKER v. CORDRAY.

1870. 54 Ill. 303.

IN this action plaintiff, under a declaration containing the common counts only, sought to recover on the oral promise of defendant to pay a judgment rendered against him. Judgment for defendant. Writ of error.

WALKER, J.— * * * The first question presented is, whether plaintiff could recover on the verbal promise of defendant to pay the judgment. Such a promise is without consideration, and cannot increase or change the liability of the debtor. The recovery of the judgment imposes the obligation to pay, and that obligation is in no wise increased or changed by the verbal promise. The verbal promise does not extinguish the binding force of the judgment. It remains unimpaired. Nor does the promise create a new debt or undertaking of binding force. If debt or assumpsit could be maintained on such a promise, an action could still be maintained on the judgment, thus giving two causes of action for one debt.

Nor can the original consideration, upon which the judgment was rendered, be recovered under the common counts.

That consideration was merged and extinguished by the higher security and obligation of record—the judgment. If it were not so, then several actions might be maintained in different forms, at the same time, for the same debt.

Lastly, it is urged that the court erred in rejecting the record of the judgment as evidence. It is a familiar rule that the allegation and proof must correspond; and we are at a loss to perceive how a judgment can support the money counts in debt. A judgment may be declared on as such, but it cannot be evidence of money had and received, loaned, paid out and expended, or of an account stated. It is only the finding by a court, that one person owes another a certain specified sum of money, and a sentence that it be collected from the debtor. We have searched in vain to find a precedent for such a recovery, counsel have referred to none, and it is believed that none exists. To recover, plaintiff in error should have declared, in the usual manner, in debt on the judgment, and then produced a transcript, properly authenticated, as evidence. We perceive no error in this record, and the judgment must be affirmed.

Judgment affirmed.

FINK v. SMITH.

1895. 170 Pa. St. 124, 32 Atl. 566.

DEAN, J.—Smith, the defendant, at a sheriff's sale of the personal property of one Sarah Hyde, wife of George Hyde, purchased a mare. Then, as a mere act of kindness toward Mrs. Hyde, he left the animal temporarily with her. Some months afterward, George Hyde, the husband, sold the mare to Fink, the plaintiff, who took her into his possession. Smith, the owner, hearing of this, went to Fink and demanded his property, but he refused to surrender possession. Then Smith informed Gallatin, the sheriff, who had sold

her to him, of the wrong, and threatened to replevy her. Gallatin replied that was not necessary, as he would get her for him. Gallatin went to Fink and obtained a promise from him to restore the mare to Smith without a replevin. Then Smith again went to Fink and the mare was delivered to him on the condition that if, on an indictment for larceny of the mare then pending against George Hyde, there should be an acquittal, the mare should be returned, but, if Hyde were convicted, Smith was to keep her. Hyde was acquitted of larceny. Thereupon, Fink replevied the mare. When the case came to trial the facts turned out as we have stated them, from the admissions of the parties and the findings of the jury. The verdict was for Fink, plaintiff, in damages to the value of the mare, hence this appeal by Smith, defendant.

The controlling assignment of error, and which, in substance, embraces all the error alleged, is raised by the following excerpt from the charge of the learned judge of the court below: "The only question remaining in this case is whether the mare was, under this agreement, to be returned to Fink if Hyde was acquitted of the charge in court of the larceny of the mare. If so, then we instruct you that there was sufficient consideration for that agreement, at the time of the lawsuit, in order to recover her, and at the time this mare was involved in the threatened lawsuit; and the only way that he could get her without a lawsuit was by making this agreement that, it is alleged on the part of the plaintiff, was made between Fink and Smith. If you believe such an agreement was made, then your verdict should be for the plaintiff for the value of the mare, with interest from that time." Was this correct instruction as to the law applicable to the evidence? There was no dispute as to the ownership of the property. The mare, it was conceded, belonged to Smith; and, although he testified no such conditional bargain was made, it was just as positively testified to, on the other side, that it was made, and the jury have found the fact against him. So, we have the unquestioned owner of the mare bargaining with one in wrongful possession, for her surrender, the possession thereafter to be determined by the verdict in a criminal prosecution then pending. Was this possession, thus obtained, wrongful as against Fink, when the event of the prosecution was the acquittal of Hyde? That depends on the validity of the contract between them.

1. The contract was void, because based on a fact which did not exist, though both parties assumed it to be a fact. Fink purchased from George Hyde. Both assumed that Hyde's title would necessarily be determined by his acquittal or conviction of larceny. But the event of the prosecution in no wise determined that. It determined, only, that the evidence did not show, beyond a reasonable doubt, a felonious intent. What the weight of it showed we do not know; but the admitted facts here, that the mare is Smith's, and that Hyde sold her, also show conclusively that Hyde was guilty of

either larceny or trespass. So their assumption that the criminal prosecution would determine Hyde's title, and necessarily theirs, was a mutual mistake of fact. "Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears such facts do not exist, the contract is inoperative." Horbach v. Gray, 8 Watts (Pa.) 497; Miles v. Stevens, 3 Pa. St. 21; Willing v. Peters, 7 Pa. St. 287; Frevall v. Fitch, 5 Whart. (Pa.) 325.

2. There was no consideration to support Smith's promise. A promise made by the owner to obtain possession of his goods, which at the time are wrongfully withheld from him, is without consideration. Chitty Cont. 51; Addison Cont. 13. This principle is conceded by the learned judge of the court below, and the undoubted wrongful possession by Fink of Smith's property is also conceded. But he assumes there is no evidence that Fink knew this at the time he delivered it to Smith, and therefore the contract should be treated as a compromise of doubtful litigation, which is a good consideration to support a contract. But the error in this view is that Fink's wrongful possession did not depend on what he knew, but on the fact. Was it Smith's property? Had he demanded it from him who wrongfully detained it? If these were the facts—and they are not denied—then there was no consideration for Smith's promise; for no benefit passed to Smith, and Fink sustained no loss by the contract. To hold that the abandonment of a wholly wrongful detention of another's property can form the basis of a compromise contract with the owner is direct encouragement to the commission of wrong for profit; and, for this very reason, the law holds the contract to be without consideration. * * *

Judgment reversed.

CITY OF DECATUR v. VERMILLION.

1875. 77 Ill. 315.

WALKER, C. J.—Appellee brought an action of assumpsit against the city, to recover for services claimed to have been rendered as a special policeman. It appears that the city having adopted an ordinance prohibiting cattle and swine from running at large in the streets, and providing for the appointment of a pound-master for its enforcement, appellee was so appointed; and inasmuch as it was apprehended that he might meet with opposition and difficulty in enforcing an observance of the ordinance, it was thought advisable to clothe him with the powers of a policeman of the city. He was, therefore, commissioned as a special policeman at the time he was appointed pound-master. There is evidence strongly tending to prove that he was informed, at the time of his appointment, that he would be paid nothing for services as policeman.

He, however, notwithstanding such notice and information, claims, and recovered in the court below, compensation for such services in addition to what was paid him for acting as pound-master. It is urged that as it was understood that he was not to receive double pay, he is precluded from a recovery.

We think there can be no question that appellee is barred from a recovery on this ground. The power to act as a policeman was only auxiliary to the office of pound-master, and was only conferred to enable him to fully perform the duties of his office of pound-master. Being only an incident to, or rather, a part of his duty as pound-master, and notified he would not be paid for services growing out of the discharge of the duties of his office as policeman, but only as pound-master, he has no right to recover for services he may have rendered as policeman. He must be held to his agreement. Had the services been rendered for an individual, under such an arrangement, no one could suppose that a recovery could be had; and corporations, private or municipal, have the same right to have contracts with them enforced, as do individuals. Nor is it any more necessary that their agreements with others should be reduced to writing than it is between individuals. The same rule applies to the one as to the other.

Dillon, in his work on Corporations, at page 206, § 172, says: "It is a well settled rule that a person accepting a public office with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case, that by subsequent statutes or ordinances his duties are increased, and not his salary. Whenever he considers the compensation inadequate he is at liberty to resign. The rule is of importance to the public. To allow changes and addition in the duties of an office to lay the foundation for extra services would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe, with much detail and particularity, the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."

In § 173 he says: "Not only has an officer, under such circumstances, no legal claim for extra compensation, but a promise to pay him an extra fee or sum beyond that fixed by law is not binding, though he renders service and exercises a degree of diligence greater than could legally have been required of him." In these rules the author is fully sustained by the authorities to which he refers.

That appellee well understood he was not to receive pay as a policeman is manifest from the fact that he was so informed at the

time of his appointment, and from the fact that he complained that his compensation as pound-master was too low, and he said he could make more by acting as a policeman, and he did not resign as such when he resigned as pound-master, and only claimed compensation whilst he acted as pound-master. From this it is apparent that he did not expect compensation for services as policeman.

We have seen that the police powers were but incident to and a part of the duties of pound-master, and were so intended and understood by the parties. If so, then, even if extra compensation or fees had been promised, the promise would not have been binding, as we have seen. Had compensation been allowed, in such cases, by ordinance, or had the corporation, by resolution, fixed his fees or salary when he was appointed, he might, no doubt, have recovered. But such was not the case, but the reverse, as he was informed he would not be paid. If not satisfied with the arrangement, he should not have accepted the office. There was no compulsion, but he acted freely, and must be bound by the understanding. The instructions, so far as they contravene the views here expressed, were erroneous, and no doubt misled the jury in their finding.

Judgment reversed.

IN RE KESLER'S ESTATE.

1891. 143 Pa. St. 386, 22 Atl. 892.

MARY R. KESLER, becoming discontented with an ante-nuptial settlement, estranged herself from her husband and refused to resume marital relations with him until he promised to revoke the marriage settlement. Upon his decease she presented a claim against the estate for her share as his widow. Claim allowed. Appeal.

STERRETT, J.— * * * Was there a valid revocation of it (the settlement)? It will be conceded that there must have been a meritorious or valuable consideration for such revocation (Stickney v. Borman, 2 Pa. St. 67), and it is very clear that neither of these existed here. The sole inducement was the doing of that which Mrs. Kesler was legally bound to do. She had voluntarily estranged herself from her husband because of her dissatisfaction with the ante-nuptial contract. There is no pretense that she had any other cause of complaint. If, as has been shown, that was a valid and binding contract, the estrangement was without justification. It was a wanton abuse of the marital relation for mercenary purposes, and reconcilement was her duty. Public policy forbids that the performance of such duty be made the subject of barter and sale. The law fixes and regulates the marital relation on public considerations, and will not allow the parties to discard and renew it for money. Thus, in Rob-

erts v. Frisby, 38 Tex. 219, the supreme court held that the husband is not legally bound by a post-nuptial contract in which he hires his wife to live with him. The same principle was affirmed by the supreme court of Tennessee in Copeland v. Boaz, 9 Baxt. (Tenn.) 223. And Mr. Justice Allen, of the supreme judicial court of Massachusetts, well said: "It is as much against public policy to restore interrupted conjugal relations as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others, or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration." Merrill v. Peaslee, 146 Mass. 460, 16 N. E. 271. There are no cases in conflict with this view decided by this court. It was not involved in Burkholder's Appeal, 105 Pa. St. 31, upon which the court below relied. It is said that abandonment of the legal proceedings instituted by Mrs. Kesler for the revocation of the ante-nuptial contract was sufficient consideration. The answer to this is that she was not prejudiced by that act. The question involved there has been raised here, and has been shown to be without merit. Mrs. Kesler is, therefore, not in a position to claim the aid of a court of equity, and the decree of the court below must be reversed.

Decree reversed.

MOAYON v. MOAYON.

1903. 114 Ky. 855, 72 S. W. 33.

DEMURRER to petition. Sustained. Appeal.

O'REAR, J.— * * * It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart because of those grounds; and that she had retained counsel to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong, resumed a relation which he, by his conduct, had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and defray the costs of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its abandonment and satisfaction will constitute a consideration to support a contract based upon that fact. Clarke v. McFarland's Ex'rs, 5 Dana (Ky.) 48; Brown v. Buford, 3 B. Mon. (Ky.) 508, 39 Am. Dec. 477; 6 Am.

& Eng. Ency. Law (2d ed.) 947, and cases. Nor is it even necessary that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievable disadvantage, that fact will equally constitute what is termed a valuable consideration. Ford v. Crenshaw, 1 Litt. (Ky.) 70; Gaines v. Scott, 3 Ky. L. 418. Becoming reconciled to the husband, with full knowledge of his actionable offense, will be a bar, as a condonement, to the suit of the wife for divorce, based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children as alimony and maintenance was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case, it likewise nullified her right to sue for and recover alimony.

It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to wit, the mutual undertaking to live together in the married state); and that, therefore, there is nothing upon which to rest the new promise. Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition—that is, an agreement between husband and wife by which the former undertook to pay the latter a stipend in consideration of their living apart—has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife, and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid. Gaines' Adm'x v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Flood v. Flood, 5 Bush (Ky.) 170; Loud v. Loud, 4 Bush (Ky.) 455; Evans v. Evans, 93 Ky. 510, 20 S. W. 605. Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual or impending separation and suit for divorce. Gaines' Adm'x v. Poor, *supra*. It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly, if an agreement between husband and wife, settling the obligations of the husband to provide for the wife, in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, *a fortiori*,

must be a contract between them under like conditions founded on the consideration of the restoration or preservation of the marital relation. See Bishop on Marriage, Divorce and Separation, § 1279. As said in Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675: "While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from foregoing a wrong committed by the other." To the same effect is the case of Phillips v. Meyers, 82 Ill. 70, 25 Am. Rep. 295. In Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227, the wife had abandoned her husband because of certain violations by him of the marital duties. She brought suit for divorce and alimony. He sought a reconciliation. Among other inducements offered by the husband was the agreement to convey her certain real estate owned by him if she would be reconciled to him. Relying upon his assurances and promises, she did become reconciled, and again took up her former relations with him as wife. He then refused to comply with his agreement to convey her the property as he had agreed. The court, at her suit for specific performance, granted the relief prayed for. In the course of the opinion it was said: "The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side of the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife it is not only partially, but entirely, performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue." In addition to the foregoing, we think the principle is also sustained by the following authorities: Smith v. Smith, 35 Hun (N. Y.) 378; Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396; Casto v. Fry, 33 W. Va. 449, 10 S. E. 799. We are consequently of opinion that the contract was based upon a sufficient consideration, and is not opposed to a sound public policy. * * *

Judgment reversed.

HARRIMAN v. HARRIMAN.

1859. 12 Gray (Mass.) 341.

ACTION of contract upon a judgment for $140.03. Plaintiff agreed with his debtor, a poor man unable to pay his debt, that if he would raise and pay him $20, he would receive it in full satisfaction of the judgment. The debtor raised that sum by borrowing and collecting,

and paid it in bank notes, which were paid and received as money, and a receipt in full given of all demands. Verdict for plaintiff for the amount of the judgment less the sum of $20. Defendant alleged exceptions.

DEWEY, J.—The rule of law which was applied to the present case by the superior court is too well settled to be open to all those considerations which might be urged if it were a new question. That the acceptance of a less sum in money than is actually due cannot be a satisfaction, and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon that condition, is, as we understand, a correct exposition of the law on the subject. In Brooks v. White, 2 Met. (Mass.) 283, it was so assumed and stated upon the authority of the adjudicated cases there cited and commented upon. Although apparently unjust to refuse to give effect to a discharge, or accord and satisfaction, freely and voluntarily made upon the payment of a less sum than was actually due, yet it stands upon the same principle upon which we deny the enforcement of a promise to pay money where such promise has been freely and deliberately made, but without any legal consideration. This would be so, although the contract had all the formalities of a promissory note acknowledging value received. But while the rule has prevailed that the payment of a smaller sum cannot be pleaded as a satisfaction for a larger, the courts have been disposed to confine its operation to cases fully within the principle of want of consideration. Hence, if payment be in a manner collateral to the original obligation, as if it be paid before the day, or be made by a stranger out of his money, or by the note of a third person, though a smaller sum is paid than the amount of the debt, such sum, thus received in discharge of the whole demand, is a valid discharge of the whole.

If any exception of this character exists in the present case, it should avail the defendant; otherwise, the general rule must be applied here. Giving a receipt in full of all demands is not conclusive evidence of actual payment of such demands; as such receipts are always open to explanation, and may be controlled by oral evidence.

The agreement of the plaintiff, upon which the defendant relies to sustain the defense of accord and satisfaction, was simply an agreement "that if the defendant, who was then poor and unable to pay, would raise and pay the plaintiff the sum of twenty dollars, he would receive the same in full satisfaction of the judgment." This was merely an agreement to accept twenty dollars in full of a judgment for a much larger sum. It was exactly the case of the acceptance of a less sum of money than was actually due. The payment in bank bills was, as treated by the parties, a payment in cash, and must so be held. Phillips v. Blake, 1 Met. (Mass.) 158. It was no part of the agreement made by the plaintiff, that if a stranger would lend the

defendant twenty dollars, he would receive the sum in full of the judgment. Nor is there anything in the case to show that the plaintiff knew that any portion of the money had been borrowed of a third person. The defendant was "to raise" the twenty dollars. But this implied nothing more than that he proposed to collect it, or obtain it from his own funds. He was unable to pay the whole debt, but that does not impart an inability to pay twenty dollars or raise that sum upon his own resources.

Exceptions overruled.

CHICAGO, M. & ST. P. RY. CO. v. CLARK.

1899. 178 U. S. 353.

DEFENDANT, a railroad company, which was indebted to plaintiff in amounts which were due and liquidated and undisputed, rendered him a statement of account, in which he was credited with such amounts only, and charged with certain cross-demands, which were unliquidated and open to dispute. It tendered payment of the balance shown by the statement to be due, on the execution by him of a receipt in full, which accompanied the statement. *Held,* by the circuit court of appeals, that the execution of a receipt, and the making and acceptance of the payment, did not constitute an accord and satisfaction; there being no consideration for the release of the remainder of plaintiff's demand. Writ of *certiorari.*

FULLER, C. J.— * * * By the writing executed and delivered by him March 9, 1888, Clark acknowledged the receipt of $173,532.49 "in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting" an item not material here. Five years and nearly five months after the receipt of the money and the execution and delivery of the discharge, this action was instituted. There was no finding or contention that the settlement was procured by fraud or duress, or was the result of mutual mistake; nor was there any finding that Clark did not have full knowledge of all the facts at the time he signed and delivered the release, and the presumption was that he had such knowledge. But the proposition is that the release was given without consideration, and that Clark was entitled to recover so far as the items of $40,000 and $9,558.63 were concerned, on the principle that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration. Cumber v. Wane, 1 Strange 426. The rule therein laid down has been much questioned and qualified. Goddard v.

O'Brien, L. R. 9 Q. B. Div. 37; Sibree v. Tripp, 15 Mees. & W. 23; Couldery v. Bartum, L. R. 19 Ch. Div. 399; Foakes v. Beer, L. R. 9 App. Cas. 621; Notes to Cumber v. Wane, in Smith Lead. Cas. 146; 12 Harvard L. Rev. 521.

The result of the modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it.

In Johnston v. Brannan, 5 Johns. (N. Y.) 268, 271, it was referred to as "that rigid and rather unreasonable rule of the old law;" and in Kellogg v. Richards, 14 Wend. (N. Y.) 116, where the acceptance of a promissory note of a third party for a less sum was held to be a good accord and satisfaction, Mr. Justice Nelson, then a member of the supreme court of New York, said: "It is true there does not seem to be much, if any, ground for distinction between such a case and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. * * * The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical and not very well supported by reason. Courts therefore have departed from it upon slight distinctions."

So, in Brooks v. White, 2 Met. (Mass.) 283, 37 Am. Dec. 95, the supreme judicial court of Massachusetts said that "the foundation of the rule seems, therefore, to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due."

To the same effect, Ranney, J., in Harper v. Graham, 20 Ohio 115; Jaffray v. Davis, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351; Smith v. Ballou, 1 R. I. 496; Mitchell v. Wheaton, 46 Conn. 315, 33 Am. Rep. 24; Seymour v. Goodrich, 80 Va. 303.

In some of the states the contrary rule has been established by statute. Ala. Code, § 2774; Cal. Civ. Code, § 1524; Georgia Code, § 3735; Maine Rev. Stat., chap. 82, § 45; N. Car. Code, § 574; Tenn. Code 1884, § 4539; Va. Code 1897, § 2858; Weymouth v.

Babcock, 42 Me. 42; Memphis v. Brown, 1 Flipp. 188 Fed. Cas. No. 9, 415; McArthur v. Dane, 61 Ala. 539.

The findings of fact bearing on the items of $40,000 for forfeiture, and $9,558.63 for nut locks, exclude any other inference than that there was a dispute between the parties in respect of those items as to the facts on which the claim for their allowance was based. This being so, it is insisted that the total balance of $223,091.02 (as it would have been if $9,558.63 had not been deducted) cannot be held to have been liquidated as a whole, that is, agreed upon by the parties or fixed by operation of law, and that the contention cannot be sustained that where there is a dispute as to an aggregate amount due, and the debtor offers to pay so much thereof as he concedes to be correct, and the creditor accepts, is paid, and releases, nevertheless the creditor can afterward assert the disputed part of his claim on the ground that he has only received what was undeniably due him.

In United States v. Bostwick, 94 U. S. 53, 67, it was said that "payment by a debtor of a part of his debt is not a satisfaction of the whole except it be made and accepted upon some new consideration;" while in Baird v. United States, 96 U. S. 430, it was held that if the debt be unliquidated and the amount uncertain, this rule does not apply. "In such cases the question is whether the payment was in fact made and accepted in satisfaction."

In Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 577, Mr. Justice Brown stated the doctrine thus: "The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such a dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In this case it cannot be said that at the time the release was executed there was no good reason to doubt that these items were open to dispute. The good faith of the company in claiming their allowance is not impugned, and as Judge Lacombe said: "Both items were legitimate matters of dispute, and unless settled by agreement of the parties, might fairly be brought by either party into court."

And the cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole.

In Fuller v. Kemp, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034,

where certain items of an account were disputed, and certain items were undisputed, and defendant paid plaintiff only the amount of the undisputed items, the court held that the dispute over certain of the items made the account an unliquidated one, and the plaintiff, by accepting the amount of the undisputed items with notice that it was sent as payment in full, was precluded from recovering the balance of his demand.

Nassoiy v. Tomlinson, 148 N. Y. 326, 330, 42 N. E. 715, 716, is to the same effect, and the court said: "A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of the two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction."

In Ostrander v. Scott, 161 Ill. 339, 34 N. E. 1089, plaintiff had an account against defendant amounting to $5,282.58, the items of which were not in dispute, but defendant claimed that he was entitled to be allowed the sum of $1,210 for commissions, and accordingly he sent his check for the difference to plaintiff, at the same time notifying him that it was sent in settlement of his account in full, and if not accepted as such to return it. The check was retained by plaintiff, and he afterwards brought suit against defendant to recover the amount withheld, but the supreme court of Illinois held that there could be no recovery, and that an account cannot be considered as liquidated, so as to prevent the receipt of a less amount as payment from operating as a satisfaction, where there is a controversy over a set-off and the amount of the balance.

In Tanner v. Merill, 108 Mich. 58, 31 L. R. A. 171, 65 N. W. 664, plaintiff sought to recover a sum which had been deducted from his wages by defendants, his employers. The amount of his wages was not disputed, but the right to make any deduction was questioned. Plaintiff received the amount of his wages less the deduction, and gave a receipt in full, and afterward brought suit to recover the balance on the ground that, having only received the amount admitted to be due, there was no consideration for the release as to that which was disputed. The supreme court of Michigan held that the plaintiff could not recover, and that the rule that a receipt of a part payment, to be effective in the discharge of the entire debt, must be rested upon a valid consideration is limited to cases where the debt is liquidated by agreement or otherwise; that a claim, any portion of which is in dispute, cannot be considered to be liquidated within the meaning of the rule; and that a receipt in full, given upon payment of the undisputed part of the claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress, or undue influence. * * *

BROWNLEE ET AL. v. LOWE ET AL.

1889. 117 Ind. 420, 20 N. E. 301.

HENRY R. LOWE & Co. engaged to construct a road for a railroad company, stipulating that they should not be required to commence work until after the railroad company had become possessed of means to pay them. On account of a deficiency of funds they refused to proceed with the work. Thereupon a contract was entered into by third parties, to the number of 164 persons, by which they agreed that, if Lowe & Co. would go on with the work, they would make up the deficiency, which was estimated at $25,000. It was stipulated that each signer was to be liable for his proportion of the sum agreed to be paid, and that the maximum amount to be paid by any one should be $250.

Several judgments were rendered in the court below against all of the defendants, each judgment being for $341.75. Appeal.

MITCHELL, J.— * * * It is claimed that upon the facts stated in the complaint the contract signed by the appellants was executed without any consideration. This position is not maintainable. It is said that the contract of appellants to pay Lowe & Co. $25,000 was nothing more than an agreement to pay them for doing that which they were by their contract, previously entered into with the railroad company, already bound to do. It is undoubtedly true that a promise, without any new consideration of some sort, to pay one if he will do that which he is already bound by contract to do without the promise sued on, is without consideration, and therefore void. Laboyteaux v. Swigart, 103 Ind. 596, 3 N. E. 373; Ritenour v. Mathews, 42 Ind. 7. It is likewise well settled that the mere naked promise to pay the already existing debt of another without a new consideration is void. Starr v. Earle, 43 Ind. 478. So where a note has already been executed by the principal, another who subsequently signs it as surety, without a new and distinct consideration, is not bound. Favorite v. Stidham, 84 Ind. 423.

None of the cases upon which the appellants rely are, however, applicable to the present case. The consideration which supports the agreement sued on is obvious. It is recited upon the face of the contract that there was a deficit to pay the contractors, which those who signed the contract agreed to pay upon the conditions mentioned. Lowe & Co. were not bound to proceed with the execution of their contract, which required a large outlay of money on their part, until ten days after the railroad company had obtained funds sufficient to assure them of their pay. The contractors were refusing to proceed, as was their right under the contract, because of the deficit. The appellants then came forward with the agreement, in which they promised to pay to Lowe & Co. the deficiency upon the conditions al-

ready mentioned; whereupon the contractors proceeded to construct, equip and put the road in operation according to their agreement. The contractors reserved, in their contract with the railroad company, the right to withhold the performance of any work until the funds were secured with which to pay them. This was ample security against ultimate loss, because they could not be required to commence work until the company had secured the necessary amount of funds. The contractors were induced to forego this prudential feature of their contract, and to commence the work, in consideration of the direct personal engagement of the appellants to pay the deficit, to the amount of $25,000, if so much should remain when the work was completed. It is now too late, after the work has been done and the deficit remains, to say there was no consideration for the agreement. * * *

Judgment affirmed.

JAFFRAY ET AL. v. DAVIS ET AL.

1891. 124 N. Y. 164, 26 N. E. 351.

DEFENDANTS gave their promissory notes upon time for one-half the debt they owed plaintiffs, and also gave plaintiffs a chattel mortgage under an agreement with plaintiffs to accept the same in full satisfaction and discharge of said indebtedness. Action was brought after full performance of such agreement to recover the balance of such indebtedness. Judgment for plaintiffs. Appeal.

POTTER, J.— * * * One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt, under an agreement to accept the same in satisfaction of such debt, forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved, if not decided, in Pinnel's Case, 5 Coke 117, "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts, and in the courts of this country, in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel Case, *supra*, and Cumber v. Wane, 1 Strange 426; Foakes v. Beer, L. R. 9 App. Cas. 605; Goddard v. O'Brien (Q. B. Div.), 21 Am. L. Reg. 637,

and notes. The steadfast adhesion to this doctrine by the courts in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject; for, while the courts still hold to the doctrine of the Pinnel and Cumber-Wane cases, *supra*, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case, a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law, and at the same time enable us, perhaps more satisfactorily, to decide whether there was a good consideration to support the agreement in this case, to refer to (the consideration in) a few of the numerous cases which the courts have held to be sufficient to support the new agreement. Lord Blackburn said, in his opinion in Foakes v. Beer, *supra*, and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction, is good," quite regardless of the amount of the debt; and it was further said by him, in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time;" "and so, if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day, at York, and you will accept it in full satisfaction for the whole ten pounds, is it a good satisfaction?" It was held in Goddard v. O'Brien, 9 Q. B. Div. 37: "A, being indebted to B. in £125 7s. and 9d., for goods sold and delivered, gave B a check (negotiable, I suppose) for £100, payable on demand, which B accepted in satisfaction—was a good satisfaction." Huddleston, B., in Goddard v. O'Brien, *supra*, approved the language of the opinion in Sibree v. Tripp, 15 Mees. & W. 26: "That a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing, and more advantageous, than the original debt, which was not negotiable." It was held in Bull v. Bull, 43 Conn. 455: "And, although the claim is a money demand, liquidated, and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good, no matter what the value." And it was held, in Cumber v. Wane, *supra*, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but, if there

be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. It was held in Le Page v. McCrea, 1 Wend. (N. Y.) 164, and in Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, that "giving further security for part of a debt, or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction;" that "if a debtor gives his creditor a note endorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." Varney v. Conery (Me.), 1 Atl. 683. And so it has been held "where, by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred, or a burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor." Rose v. Hall, 26 Conn. 392. And so "payment of less than the whole debt, if made before it is due, or at a different place from that stipulated, if received in full, is a good satisfaction." Jones v. Bullitt, 2 Litt. (Ky.) 49; Rickets v. Hall, 2 Bush (Ky.) 249; Smith v. Brown, 3 Hawks (N. Car.) 580; Jones v. Perkins, 29 Miss. 139; Schweider v. Lang, 29 Minn. 254, 12 N. W. 33. In Watson v. Elliott, 57 N. H. 511-513, it was held: "It is enough that something substantial which one party is not bound by law to do is done by him, or something which he has a right to do he abstains from doing, at the request of the other party, is held a good satisfaction."

It has been held in a number of cases that, if a note be surrendered by the payee to the maker, the whole claim is discharged and no action can afterward be maintained on such instrument for the unpaid balance. Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun (N. Y.) 559. It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. Harper v. Graham, 20 Ohio 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or, at least, something different. It may be more or it may be less, as a matter of fact." It was held by the supreme court of Pennsylvania in Bank v. Huston, 11 Wkly. Notes Cas. 389 (February 13, 1882). The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, as by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable. It has been held that a payment in advance of the time, if agreed to, is a full satisfaction for a larger claim not yet due. Brooks v. White, 2 Metc. (Mass.) 283; Bowker v. Childs, 3 Allen (Mass.) 434. In some states, notably Maine and Georgia, the legislature, in order to

avoid the harshness of the rule under consideration, have, by statute, changed the law upon that subject by providing: "No action can be maintained upon a demand which has been canceled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small." Citing Weymouth v. Babcock, 42 Me. 42. And so in Gray v. Barton, 55 N. Y. 68, where a debt of $820 upon book account was satisfied by the payment of one dollar by calling the balance a "gift," though the balance was not delivered, except by fiction, and the receipt was in the usual form, and was silent upon the subject of a gift, and this case was followed and referred to in Ferry v. Stephens, 66 N. Y. 321. So it was held in Mitchell v. Wheaton, 46 Conn. 315, that the debtor's agreement to pay, and the payment of $150, with the costs of the suit, upon a liquidated debt of $299, satisfied the principal debt. These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the 'old law,'" as it is characterized in Johnston v. Brannan, 5 Johns. (N. Y.) 268-272; or as it is called in Kellogg v. Richards, 14 Wend. (N. Y.) 116, "technical and not very well supported by reason;" or, as may be more practically stated, a rule that "a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not." See note to Goddard v. O'Brien, *supra,* in 21 Amer. Law Reg. 640, 641.

The state of the law upon this subject, under the modification of later decisions, both in England and in this country, would seem to be as expressed in Goddard v. O'Brien, *supra:* "The doctrine in Cumber v. Wane, is no doubt very much qualified by Sibree v. Tripp, and I cannot find it better stated than in 1 Smith Lead. Cas. (7th ed.) 595: 'The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been ingrafted on it, may perhaps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount such an agreement being *nudum pactum.* But if there be any benefit or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.'" Bull v. Bull, 43 Conn. 455; Fisher v. May, 2 Bibb. (Ky.) 449; Reed v. Bartlett, 19 Pick. (Mass.) 273; Bank v. Geary, 5 Pet. (U. S.) 99-114; Le Page v. McCrea, 1 Wend. (N. Y.) 164; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76; Brooks v. White, 2 Met. (Mass.) 283; Jones v. Perkins, 29 Miss. 139-141; Hall v. Smith, 15 Iowa 584; Babcock v. Hawkins, 23 Vt. 561.

In the case at bar, the defendants gave their promissory notes upon time for one-half the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures and other personal property of the defendants, under an agreement with plaintiff to accept the same in full satisfaction and discharge of said indebtedness. De-

fendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was, by the parties, substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security. It was some trouble at least, and perhaps some expense, to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions, or the power of disposing of this property, and gave the plaintiff such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any. It seems to me, upon principle, and the decision of this state, and of quite all of the other states, the transactions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge Andrews, in Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606, from which I quote: "But it is held that, where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled, except for the agreement, then the agreement is not *nudum pactum,* and the doctrine of the common law to which we have adverted has no application." Upon this distinction the cases rest, which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. Curlewis v. Clark, 3 Exch. 375. * * *

Judgment reversed.

REYNOLDS v. NUGENT.

1865. 25 Ind. 328.

NUGENT signed a written contract by which he agreed to enter the military service of the United States to the credit of Tobin township, in consideration of the payment of a bounty of $100. Reynolds, the agent of the township accompanied Nugent to the mustering office to procure his muster-in and to pay him the bounty promised. While

there, Nugent was offered by others a bounty of $350, and refused to perform his contract unless the township would pay him that amount. Thereupon the agent, to induce Nugent to perform his contract, promised that he would be responsible that Nugent should receive that amount from Tobin township.

Complaint for work and labor performed. Finding for Nugent and judgment for $250. Appeal.

RAY, J.— * * * It is urged, on behalf of the appellant, that the promise of Reynolds to pay $350 was void for want of consideration. This position, in our judgment, is correct. The contract was already complete and perfect. Nugent had, as he states, agreed to enter the military service of the United States and have the credit given to Tobin township, upon the promise that he should be paid the sum of $100. That promise was binding upon both parties. The one promise was a sufficient consideration for the other. He now claims that the appellant, to induce him to fulfill his legal obligation, promised to pay him an additional sum. There were no new duties assumed by Nugent, but he claims that, in consequence of the promise by the appellant, he went forward and performed the contract he was already under legal obligation to comply with. If the appellant made the promise, it was without any adequate consideration, and cannot be enforced in law. 1 Parsons on Contracts, 5th ed. 437. That a promise to do what a person is bound to do by law is not a good consideration for another undertaking, and that a person is not bound to fulfill his promise to pay another for doing what he is bound by law to do, is well settled. Thus, a promise to pay extra compensation to a witness obliged by law to attend upon subpœna is not binding, if the witness has been served. In Collins v. Godfroy, 1 Barn. & Adolph 949, Lord Tenterden, C. J., says: "If it be a duty imposed by law upon a party regularly subpœnaed to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration." And it can make no sort of difference whether the duty be one imposed by statute, or one which has been assumed by contract. The well-known cases of promises by masters of vessels to pay sailors extra for doing only their duty, illustrate this. Harris v. Watson, Peake 72; Stilk v. Myrick, 2 Camp. 317. On the same principle, a promise by a creditor to accept part payment of a debt in full satisfaction is not binding. In like manner, a promise by the holder of a joint and several note to one maker, who had paid part or promises to pay part, to look only to the other make for the balance is not binding, and is no defense to an action to recover such balance of the first maker. The payment of a debt by a debtor, the same being due and payable, is not a sufficient consideration to support a promise. It is not considered as any detriment to the debtor, or benefit to the creditor. The one pays what he was bound to pay and the other receives no more than his just debt. Such a considera-

tion is merely nominal and insignificant, and is deemed in law no consideration at all. Smith v. Bartholomew *et al.*, 1 Met. (Mass.) 276.

Nor does it add anything to the plaintiff's claim in this case, that he attempts to establish a personal contract with the agent of those to whom he was already bound. He knew of that agency, and therefore could only treat with him, so far as the subject-matter of that contract was involved, in his capacity as agent. The plaintiff well knew that the defendant accompanied him as the agent of the parties with whom the contract had been made, simply to comply with the terms of the contract, and that as such agent he had no power to make any new contract, still less to release the plaintiff from the obligation already incurred, and make a new contract on his own behalf.

Upon the evidence in this case, there can be no recovery against the defendant.

Judgment reversed.

LINZ v. SCHUCK.

1907. 106 Md. 220, 67 Atl. 286.

THE plaintiff contracted to construct a cellar for a price based upon a supposed condition of the soil, but afterwards, upon the occurrence of substantial and unforeseen difficulties in its construction which would cast upon him an additional burden not contemplated by the contract, refused to carry it out until the defendant promised to pay him an additional compensation.

Judgment for plaintiff on the promise. Appeal.

BOYD, J.— * * * The principal question in the case is whether the plaintiff was entitled to recover for the additional costs and expenses incurred, by reason of those conditions, on the promise of the appellant to pay him for them. The precise question for our consideration is presented by the plaintiff's fifth prayer, which was granted. After referring to the written contract made in April or May, 1903, and the refusal of the plaintiff in June, 1903, to perform and complete said contract, the prayer further submitted to the jury to find whether "said refusal on the part of the plaintiff was induced by substantial and unforeseen difficulties in the performance, which would cast upon the plaintiff additional burden not anticipated by the parties when the contract was made, and if they further find that after said refusal by the plaintiff the defendant, to induce the plaintiff to resume the work thus abandoned, promised him to see him through and to stand the consequences, and that, relying upon said promise, the plaintiff completed the work, then their verdict may be for the plaintiff," etc. That prayer seems to have followed

quite closely the language used in King v. Duluth, M. & N. Ry. Co., 61 Minn. 487, 63 N. W. 1105, which case, notwithstanding unfavorable criticisms by some writers, in our opinion, announces a principle which is not only just and equitable, but is easily reconcilable with the general rule that a promise to do, or actually doing, that which a party to a contract is already under legal obligation to do is not a valid consideration to support the promise of the other party to the contract to pay additional compensation for such performance. * * * Chief Justice Start, of the Minnesota court, in the course of the opinion, said: "It is entirely competent for the parties to a contract to modify or waive their rights under it and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but, where the promise to the one is simply a repetition of a subsisting legal promise, there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But, where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay for benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule," etc. The opinion then goes on to say that on the other hand, when there are no unforeseen additional burdens which make the refusal to perform unless promised further pay, equitable, and such refusal and promise of extra pay are one transaction the promise is without consideration and the case is within the general rule. It then holds that what unforeseen difficulties and burdens will make the refusal to perform equitable, so as to bring it within the exception to the general rule, must depend upon the facts of each particular case.

We have thus referred to, and quoted from, that case at unusual length, because the principles therein announced seem to us to be, not only well and clearly stated but just, and founded on reasons that any court of justice should hesitate to reject, unless they conflict with some binding authority or established rule of law which, in our judgment, they do not. When two parties make a contract based on supposed facts which they afterwards ascertain to be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required

him to meet, not only courts of justice but all right thinking people must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. If the difficulties be unforeseen, and such as neither party contemplated, or could have from the appearance of the thing to be dealt with anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him. But we do not understand the authorities to sustain such a rule. On the contrary they hold that the parties can rescind the original contract, and then enter into a new one, by which a larger consideration for the same work and materials that were to be done and furnished under the first contract can be validly agreed upon. Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally; but we are met with the contention (where it must be admitted is sustained by courts of high authority) that, while this is true, yet after a contract is broken by one of the parties the other cannot waive his right to treat it as no longer existing, and bind himself to pay more than the original contract called for, unless the original contract is actually rescinded. * * *

We are, however, of the opinion that this prayer can be sustained on the ground stated in King v. Duluth, etc., Ry. Co., *supra,* and other cases, which is, as expressed in that case, that "by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them." When there is such a strong moral obligation as there was in this case to give the appellee relief, it would be making an exceedingly technical distinction to hold that the promise would have been binding if the original contract would have been expressly rescinded, but that it is not binding because there was no express or actual rescission, although the facts show that it was undoubtedly intended by the parties that neither should be held to the terms of the original contract. Of course it will be borne in mind that the court in King v. Duluth, etc., Ry. Co. only applied the principle announced to cases where the refusal to perform was equitable and fair, and the difficulties were substantial, unforeseen, and not within the contemplation of the parties when the original contract was made. The opinion also excluded from the application of the principle mere "inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact." We need not go further than the doctrine announced by that case; but there are many others based upon the principle of waiver, some of them not being affected or governed by the motive of the promisee in refusing to perform the original contract, and we do not want to be understood by referring to or

quoting from them as meaning to adopt all that is said in them. In Meech. v. Buffalo, 29 N. Y. 198, it was held that a municipal corporation, with power to construct public improvements, could bind itself to pay an increased compensation to a contractor in consequence of the enhanced cost of the work by reason of a fact not within the knowledge of the parties at the time of the making of the original contract. In that case the contractor in building a sewer came in contact with quicksand. In Michaud v. MacGregor, 61 Minn. 198, 63 N. W. 479, contractors undertook to build a house on the lots of the promisor in the city of Duluth. In the course of construction they met with unexpected obstacles, unknown to either party when the contract was made, being rocks below the surface of the lots which had been placed there by the city. The contractors refused to proceed with their contract unless paid for extra work in removing the rocks, which the agent of the owners agreed to do, provided they would keep a strict account of such extra work and aid in securing evidence of appellant's damages. The contractors assented and performed their part. It was held the contract was supported by a valid consideration. In Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, Judge Cooley sustained an action on a note which included the price of ice in addition to the original contract price. He referred to unexpected and extraordinary circumstances arising. That case goes further than most we have found, and it has been suggested that it has been overruled by Widiman v. Brown, 83 Mich 241, 47 N. W. 23; but Goebel v. Linn was not only not in terms overruled, but was cited to the court, and the court simply said it and the other cases did not bear out the contention of the defendant, without in any way intimating any dissatisfaction with that case. In Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209, complainant had agreed to do certain excavation, blasting, etc., on a railroad, as a subcontractor under defendant at a fixed price. The agreement was made under certain misrepresentations of the company as to the character and quality of the work to be removed, whereas in fact the rock proved to be much harder than represented, more expensive to drill, and worthless afterwards for foundations, culverts, etc. The contractor promised to allow the complainant an additional sum per cubic yard, and it was held that his estate was liable to account therefor. New promises have been held to be valid on various grounds in a number of cases, all of which we do not adopt, but in addition to those already cited we refer to Cooke v. Murphy, 70 Ill. 96; Lawrence v. Davey, 28 Vt. 264; Conelly v. De Voe, 37 Conn. 570; Courtenay v. Fuller, 65 Me. 156; N. J. Trust Co. v. Nat. Gas. Co., 71 N. J. L. 29, 58 Atl. 104; Agel v. Patch Mfg. Co., 77 Vt. 13, 58 Atl. 792. See, also, 30 Am. & Eng. Ency. of Law 1197, where it is said that, when the contractor refuses to perform his contract and the builder promises to pay additional compensation in consideration of the performance of the contract, the authorities

are not in accord, but adds that "the prevailing rule seems to be, however, that such a promise is valid, as an abandonment of the original contract and the creation of a new contract." In Anson on Contract, 76, after speaking of the well-known case of the sailors not being entitled to recover more than their contract called for, it is said: "It would have been otherwise if risks had arisen which were not contemplated in the contract. For instance, such a contract as that which the seamen had entered into in the case just cited contains an implied condition that the ship shall be seaworthy." Mr. Brantly on page 70 of Law of Contracts, after referring to the other doctrine, says: "But the rule of other cases is that the promise is valid because the promisee is entitled to choose between the risk of being sued for a breach of his contract and the prospect of loss from going on at the original price. It also seems that the new promise of additional compensation amounts to a novation or a substituted contract. While a contract is an executory on both sides, the parties are at liberty to rescind it by substituting a new one in its place."

So, without further citation of authorities, we are of the opinion that the fifth prayer of the plaintiff was properly granted for reasons stated above. * * *

Judgment affirmed.

PARMLY v. BUCKLEY.

1882. 103 Ill. 115.

IN this case one of the parties to a contract for the sale of real estate notified the other in writing that he considered himself released from the contract, and the other gave him notice that he accepted the surrender of the contract and declared the contract at an end.

CRAIG, C. J.— * * * The parties to the contract of July 9, 1880, had the right, if they saw proper, to cancel and set aside that contract, and the first question to be determined is, whether the two contracting parties have exercised that right.

The notice, bearing date August 25, 1880, signed by the Rubber Paint Company, and served upon the Buckleys, shows a clear intent on the part of the company not to be longer bound by the contract, and a desire that it should be cancelled. Indeed, the company, so far as it was within its power, cancelled the contract. When this notice was received the Buckleys at once notify the company that they accept the surrender of the contract, and declare it terminated and at an end. We are aware of nothing which could have been done by these contracting parties which would have more effectually put an end to the contract than what they did. The purchaser, in effect, said it did not desire to be bound longer by the contract, and de-

clared it an end. The vendors at once accepted the proposition of the purchaser, and declared the contract cancelled. * * *

AGEL & LEVIN v. PATCH MANUFACTURING CO.

1904. 77 Vt. 13, 58 Atl. 792.

ROWELL, C. J.—The case is this, as far as necessary to be stated: The plaintiffs, by correspondence, sold to the defendant a car of scrap iron at $18 per net ton, delivered at Rutland. After shipment, but before delivery, the defendant refused to take the iron at $18 per net ton, whereupon the parties verbally altered the contract by fixing the price at $18 per gross ton, and thereupon the defendant took the iron, and paid for it at the latter price. The plaintiffs now claim that the alteration was without consideration, and void, and seek to recover in general assumpsit the difference between the prices. Some courts hold that a party is not bound to perform his contract, but may break it at will, and pay damages; and that, having broken it, if he consents to perform on terms more favorable to himself, he is doing that which he is not legally bound to do, and so there is a sufficient consideration for the other party's assent to those terms. Other courts hold that a party is bound to perform his contract, and consequently that there is no consideration for the other party's assent to those terms unless there is a valid discharge of the original contract. Harriman, Cont. 70. But however this may be while the modified contract remains executory, when it is performed by the party in whose favor it was modified, it becomes binding on both parties, and the original contract is thereby discharged, unless it appears that such was not the intention of the parties. Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Lawrence v. Davey, 28 Vt. 264. It is said in Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328, that there is a class of cases that a written contract may be altered by mere verbal agreement of the parties, which, at its inception, would have no binding force, but when acted upon by the parties till it would work a fraud or an injury to refuse to carry it out would become binding and effective as a contract. Even a contract under seal may be discharged by the performance of a subsequent parol agreement. Thus, in Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475, the plaintiff, by an instrument under seal, agreed to erect a building for a price that proved inadequate, and, having performed in part, refused to proceed, whereupon the defendant promised that, if he would complete the work he should be paid a reasonable price for his labor and materials, and thereupon he completed the work; and it was held that, having completed it on the faith of the new contract, the plaintiff could recover on the strength of it,

and that the old contract was no defense. See, also, Dearborn v. Cross, 7 Cow. (N. Y.) 48. In Le Fevre v. Le Fevre, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696, parol evidence was admitted to prove an alteration of the course of an aqueduct established by deed. The court said that, if the agreement substituting another spot had not been acted upon, it would not have been admissible, but, as the situation of the parties had been altered by acting upon it, the evidence was proper, for a party may prove by parol that, after signing a written agreement, the parties made a verbal agreement varying it, provided the variation had been acted upon and the original agreement cannot be enforced without fraud upon one party. In the case at bar the new agreement has been acted upon by the parties, and fully performed by the defendant, and the original agreement cannot now be enforced without injustice to the defendant.

Judgment affirmed.

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§ 22.—Part of an Entire or Indivisible Consideration Illegal.

HENDERSON v. PALMER.

1874. 71 Ill. 579.

BILL to set aside and cancel note, mortgage, judgment and sale of property because they were void but operated as a cloud on petitioners title. Bill dismissed. Appeal.

WALKER, J.—It appears from the record in this case, that one H. B. Henderson, the son of appellant, was employed as an operator by a telegraph company in Chattanooga, in the State of Tennessee, prior to the year 1867; that the officers of the company instituted a criminal prosecution against him for embezzling $220, money of the company; that by the laws of the State of Tennessee embezzlement is made a felony. After the prosecution was commenced on the 26th day of November, 1867, appellant was, to stop the prosecution against her son, induced to execute a note, with her husband and another, for $980, and a mortgage on the house and lot in which she and her husband lived, to one O. H. Palmer, an agent of the company, to secure the payment of the note. The house and lot was her sole property, derived from other sources than from her husband. There seems to be no question that the consideration for the note and mortgage was a promise that her son should be discharged and the prosecution dismissed. There was no agreement even that the son should be discharged from the claim of $220, which was set up against him by the officers of the company. * * *

We regard the evidence as clear and convincing that the property mortgaged belonged to appellant in her own right, and that the only consideration of the note was the agreement to dismiss the criminal

prosecution against the son of appellant. Even if it could be inferred that it was intended to secure the $220 claimed to have been used by the son, still there would be $760 for which there was no other consideration than the agreement to dismiss the prosecution. Is this, then, such a consideration as will support the note and mortgage; or is such a consideration illegal, and does it render them voidable? If there had been an indebtedness, as claimed, we presume that it could and would have been proved against H. B. Henderson. But there is no proof that he owed the telegraph company even the $220 claimed to have been embezzled, nor any other sum. It was denied that he owed the company, that or any other amount, and the evidence of Van Duger, who examined the books, tends to prove that he was not indebted to the company in any sum whatever. The copy of the indictment did not prove it, or any other fact. But even if he did owe a small portion of the amount, that would not warrant the extortion of the balance. When such a prosecution was pending those pressing the prosecution knew the power it gave them to extort money of the mother, and the evidence seems to show that they availed themselves of the power to procure the note and mortgage. The rule is fully recognized, that when a contract grows immediately out of, or is connected with an illegal or an immoral act, a court of justice will not lend its aid in its enforcement. Nash v. Monheimer, 20 Ill. 215. Where money is paid to compound a felony, or an agreement, even, entered into to pay money for such a purpose, such a contract is immoral and illegal. If money is paid, or agreed to be paid, on an agreement not to prosecute for a larceny or other crime, such an agreement is the compounding of a felony, and is itself a crime, and indictable as such. Bothwell v. Brown, 51 Ill. 234. It has been held to be compounding a felony where a person receives a note signed by a party guilty of larceny as a consideration for not prosecuting him. Commonwealth v. Peas, 16 Mass. 91; Wallace v. Hardacre, 1 Comp. 45. "Any contract as security, made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offense, without leave of the court, is invalid." 1 Chit. Crim. Law 4, 5 East 298, 11 East. 46, and the other cases cited in support of the text.

In the case of Collins v. Blantern, 2 Wils. 347, which was a suit on a bond given to stifle a prosecution for perjury, Lord Chief Justice Wilmot, in delivering the opinion, used this language: "We are all of the opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law and all laws whatever." The court further said: "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law, and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity; all writers upon our law agree in this: no polluted hands shall touch the pure fountains of justice."

As a general rule, if any part of an entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. "If a part of the consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal." 1 Parsons on Contracts, 380. And it is believed that he announces the well-recognized rule of the common law.

It then follows that this note and mortgage were void, as being given in violation of law, and for an immoral and illegal purpose, and appellee should not be permitted to profit by such a transaction. He should not reap the fruits of such a contract, and there was no equitable or legal ground for enforcing the payment of the money or the sale of the mortgaged premises. * * *

Decree reversed.

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§ 23.—One or Part of Any One of Several Considerations Illegal.

WIDOE v. WEBB.

1870. 20 Ohio St. 431.

SCOTT, C. J.—The evidence in this case tended to show that the consideration of the note sued upon was an existing indebtedness of the defendant to the plaintiff on account for goods, etc., sold and delivered by the plaintiff to the defendant, the items of which had accrued at various times during the period of eighteen months preceding the date of the note. Some of these items were for necessary family groceries and some for spirituous liquors, sold to be drank at the place where sold, in violation of the statute. The court instructed the jury that, if any of the items for spirituous liquors thus illegaly sold entered into and formed part of the consideration of the note, then the plaintiff could not recover; the law being that when any part of the entire consideration of a promise is illegal the whole contract is void. And the question before us is: Did the court err in so instructing the jury as to the law applicable to the case?

The concurrent doctrine of the text-books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established. But this cannot be done when one of two or more consid-

erations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are inseparable. Metcalf on Cont. 246; Addison on Cont. 905; Chitty on Cont. 730; 1 Parsons on Cont. 456; 1 Parsons on Notes and Bills 217; Story on Prom. Notes, § 190; Byles on Bills 111; Chitty on Bills 94. Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto,* illegality in respect to a part of the consideration avoids it *in toto.* The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. (Story on Prom. Notes, and Byles on Bills, *supra.*) And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute. (See authorities, *supra.*) * * *

The application of these principles to the present case compels us to say, that the instruction given to the jury by the court upon the trial was correct, and the judgment was properly affirmed by the district court.

The suit was upon a promissory note alone—upon a single and entire promise. This note was given in settlement of an account embracing transactions between the parties for a period of eighteen months. The evidence tended to show that whilst some of these transactions were proper and legal, yet many of the items of the account were for intoxicating liquors sold by the plaintiff to the defendant in direct violation of the provisions of a highly penal statute. The contract evidenced by the note was illegal and void, because these sales of liquors, which formed a part of its consideration, were clearly illegal.

With respect to the items of the plaintiff's account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note. For being utterly void it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: "It is but a reasonable punishment for including with his just due that which he had no right to take." * * *

Judgment affirmed.

KING v. KING.

1900. 63 Ohio St. 363, 59 N. E. 111.

ERROR to circuit court.

Action by one King against one King, executor of James Howland, deceased, and others, to recover for personal services rendered in the performance of a contract made with James Howland, in 1881, whereby plaintiff agreed to live with him and take care of him during his life. He was a man of means, well advanced in years, without family, living on Euclid avenue in Cleveland, and much of the time in ill health. The plaintiff was a daughter of his niece. She performed the contract on her part, the service extending from the year 1881 to 1896, when Howland died. The contract, as stated in the petition, was that "this plaintiff agreed with the said James Howland that she would refrain from marriage while he should live, and that she would live with him and take care of him while he lived; and he, in consideration thereof, agreed that he would provide for her amply sufficient to make her comfortable and well off." Howland, in his will, left to plaintiff a legacy of $500, but, save small amounts of money given her from time to time, did not perform the contract. A recovery was had in the common pleas. The judgment was reversed by the circuit court because of error in the charge of instructing the jury that the contract was a legal one, and, if proven to have been made as alleged, and duly performed by plaintiff, there might be a recovery. To reverse this judgment of reversal this proceeding is prosecuted.

SPEAR, J.—The sole ground of reversal is that the contract is void, because against public policy, being in restraint of marriage; hence there could be no recovery. That contracts in restraint of marriage are void, as being contrary to the public policy of the law, is conceded. But the question here is whether the contract to render service, fully performed by the one party, so rests upon the promise not to marry, or is so tainted by that part of the agreement as to be incapable of enforcement. The consideration moving to the agreement on the part of Howland to make ample provision for his niece was, on its face, two-fold: One, the promise to perform the service agreed upon; the other, not to marry during the continuance of such service. The first was a valid promise, and of itself sufficient to support the promise of the other party; the second was a void promise, not affording any consideration whatever. As given in text-books and numerous decisions, the general rule is that if one of two considerations for a promise be merely void, the other will support the promise, although, if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions, as will be shown later on. That is, if one of two considerations is void merely for insufficiency, and not for illegality, the other will support

the contract. Widoe v. Webb, 20 Ohio St. 435; Metc. Cont. 246; Chitty. Cont. 988; 1 Pars. Cont. 456; Comst. Cont. 24; Pikard v. Cottels, Yel. 56; Bliss v. Negus, 8 Mass. 51; Carleton v. Woods, 28 N. H. 290; Woodruff v. Hinman, 11 Vt. 592; King v. Sears, 2 Cromp., M. & R. 48; Erie Ry. Co. v. Union Locomotive and Express Co., 35 N. J. Law 240; Bradburne v. Bradburne, Cro. Eliz. 149. This distinction between a contract merely void and an illegal contract would seem to be an important one. Courts, as a general proposition, are open for the enforcement of contracts; not for their destruction. So that where parties have deliberately entered into a contract valuable to them, and one has received the full advantage of it, the general policy of the law is to exact proper performance by him who has thus obtained the advantage; and some substantial defect should be shown before a court will refuse enforcement. A mere technical objection should not prevail. Now, a void contract is one which has no legal force, and which, for that reason, cannot be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins and for that reason is not enforceable. There is no provision, either by statute or at common law, which enjoins upon any particular person the duty to marry; nor can any one be punished for not marrying. To marry or not to marry is left to the free choice of all who are eligible to marriage. Hence to omit to marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise, and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law, or of placing parties who may have entered into it outside the pale of the law. But, aside from this, in the present case the promise on the part of the woman, which was of value to the man, was the promise to care for him. The promise not to marry was a mere incident to the main purpose, entered into simply because it was supposed that by remaining single the woman could the better perform her contract. It was immaterial to the man whether she married or not, so long as she fulfilled her promise as to care. In other words, the promise to remain unmarried did not enter into or become part of the substance of the general agreement. That agreement was for the performance of services. If the performance was adequate and the services rendered in a satisfactory manner, their value could neither be enhanced nor diminished by the fact that they had been rendered by a single woman rather than a married one. So that, had the plaintiff married, yet, if she satisfactorily performed her contract, the recipient of the services would lose nothing by the fact of marriage. As matter of fact she did not marry; whether because of the contract or for reasons wholly apart from it is not material, for she was under no obligation to marry nor to refrain from so doing. She

did perform the service. That, the verdict and judgment of the common pleas settles to all intents and purposes for the present inquiry. As above stated, the promise not to marry, although void because against public policy, was not illegal as against positive law; and it is not easy to perceive how its presence in the contract, or its observance by her, or both facts, could place the parties in what is termed *in pari delicto,* i. e., in a position where the law should adjudge them guilty of its violation, and hence refuse relief for that reason in the face of the fact that the claimant had fully performed. In such case the maxim, *"In pari delicto melior est conditio possidentis,"* has, in reason, no application, and, we think, ought not to have application in law. * * *

Judgment reversed.

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§ 24.—Two Distinct Promises, One Legal and the Other Illegal.

OHIO EX REL. v. BOARD OF EDUCATION.

1880. 35 Ohio St. 519.

APPLICATION for a peremptory writ of mandamus.

A board of education, under the provisions of the act of March 13, 1868 (S. & S. 710), authorizing it to borrow money to pay existing indebtedness, by the issue and sale of bonds bearing interest at a rate not exceeding eight per cent per annum, payable semi-annually, agreed to borrow a sum of money at an aggregate rate of interest of fifteen per cent in manner following: For the amount so to be borrowed bonds were to be issued, bearing the authorized rate of interest, and for the excess of interest orders on the treasury were to be issued payable at the same time as the legal interest. The bonds were regularly issued, bearing eight per cent interest, and sold at par, and the money was received and used as authorized. For the excess of interest orders on the treasury were at the same time issued and delivered to the purchaser, as agreed to by the parties, but were never presented for payment, and after their maturity he offered to return them for cancellation.

JOHNSON, J.—* * * In Ohio, an usurious contract does not carry with it that deep moral stain that attached under the usury laws of England and some of the states. Here, such a contract is not void, and a recovery thereon, to the extent of the loan and legal interest, can be had. The theory on which this principle is founded is that, to the extent of the usurious interest, there is a failure of consideration, and, therefore, as to the usury the contract is voidable only. Selser v. Brock, 3 Ohio St. 302.

These bonds, if void at all, are so not on the ground of any deep moral stain arising from the contract for usury, but from a want of

capacity in the board to make such a contract. They are illegal, if at all, because unauthorized by statute, i. e., because the board had no power to make such a contract. * * *

The negotiations for the loan, though in their inception an entirety for the loan of a sum of money at fifteen per cent, yet, as consummated by the contract actually made, consisted of two distinct promises by the board, based upon a single consideration. The one, evidenced by the bonds in strict conformity with the statute; the other evidenced by the orders covering the excess of interest. The board did not intend to make one contract, nor did it. In its attempt to exercise the powers conferred, the two agreements were made, both regular and valid on their face, but one clearly in excess of the powers granted.

This brings the case clearly within the rule: "That when a power, created by statute, has been fully executed, and something not authorized by the statute has been added, but which is clearly distinguishable from the rightful execution, the execution of the power is good, so far as authorized by the statute, and void only as to the excess," i. e., at law. Commrs. of Knox Co. v. Nichols, 14 Ohio St. 260.

In such cases the general rule is that "where there is a complete execution of the authority and something *ex abundanti* is added which is improper, then the execution is good and the excess only is void, but where there is not a complete execution of the power, or where the boundaries between the excess and the rightful execution are not distinguishable, then the whole is void." Story on Agency 166; Doty v. Knox County Bank, 16 Ohio St. 133; 2 Kent's Com. 467.

In Widoe v. Webb, 20 Ohio St. 435, it is said, that "where for a legal consideration a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established." Care must be taken not to confound this rule with another equally well settled, that where one of two considerations is illegal and the other legal the illegality of the one avoids the promise founded on both.

In the former case there is one lawful and valuable consideration to support two promises, one legal, the other illegal, that are separable. In the latter case there are two considerations, one legal the other illegal, to support one promise. The reason for this well-marked distinction is that in the latter case, the promise being supported by two considerations, one lawful the other unlawful, is an entirety based upon both, and can not be apportioned, and it is against public policy to enforce a promise so supported. In such a case both considerations, as a whole, are the basis of the entire promise. Where, however, the whole consideration is lawful and the promisor undertakes to do two things, one that is lawful and the other unlaw-

ful, and they are clearly distinguishable, the good consideration will support the lawful promise.

The case at bar is one of two promises, one lawful the other unlawful, founded on one lawful consideration. The unlawful promise evidenced by these orders is separate and distinct from the lawful. The former is void because prohibited by statute, while the latter is expressly authorized and is supported by a valid consideration, to-wit, the money loaned.

Peremptory writ awarded.

OSGOOD v. CENTRAL VERMONT R. CO.

1905. 77 Vt. 334, 60 Atl. 137.

ROWELL, C. J.— * * * The general rule is, where you cannot sever the illegal from the legal part of a contract, that the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, that you may reject the bad and retain the good. It was unanimously agreed in 14 H. 8, 25, 26, that if some of the covenants of an indenture or of the conditions indorsed upon a bond are against the law, and some good and lawful, the covenants or conditions that are against the law are void *ab initio,* and the others stand good. This was adopted in Pigot's Case, 11 Coke 26; and from it has sprung the generally accepted doctrine that where there is a promise to do two things, one legal and the other illegal, the promise to do the legal act will be enforced, and the promise to do the illegal act will be disregarded. United States v. Bradley, 10 Pet. (U. S.) 343, 360, 9 L. ed. 448. And it makes no difference whether there are two distinct promises, or whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable. Greenwood v. Bishop of London, 5 Taunt. 727, 381-82; Newman v. Newman, 4 M. & S. 66; Harriman on Cont. 134. One of the most common instances of the application of this rule is in cases of agreements in restraint of trade, which are held to be divisible both as to time and place. Baines v. Geary, L. R. 35 Ch. D. 154, is a case of the former kind. There, in an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customers served by, or belonging at any time to, the master, his successors or assigns. Held, severable, and capable of enforcement in respect of persons who were customers during the employment. There are many cases of the latter kind. In Price v. Green, 16 M. & W. 346, the covenant was never to carry on a certain business in the cities of London or Westminster, nor within 600 miles of them. Held, that the covenant was divisible, and good as to those cities, but bad as to the 600 miles. A covenant not to engage in the manufacture of ocher "in the county

of Lehigh or elsewhere" is divisible, and good as to the county. Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251. A contract not to engage in a particular trade or business for a specified time "in the City of St. Louis nor at any other place" is divisible. Peltz v. Eichele, 62 Mo. 171. So a covenant not to enter into a certain business in a certain county, nor, for a time, into the same business in the United States, is good as to the first, though bad as to the last. Dean v. Emerson, 102 Mass. 480. * * *

BOYD ET AL. v. EATON.

1857. 44 Me. 51.

APPLETON, J.—This was an action of *assumpsit* upon an account annexed. It appeared in evidence that the plaintiffs, having a stall and stock of goods in the Market house in Bangor, sold on the 29th of December, 1856, to the defendant, their fixtures and such articles of their stock as he might select; that he selected those specified in the account in suit, among which are found various articles, the sale of which is prohibited by law. The articles are all charged as of the same date, but separate prices were affixed to each article.

At the trial at *Nisi Prius,* the plaintiffs' counsel moved to amend by striking out of the account the articles the sale of which was unlawful. This amendment was allowed against the protest of the counsel for the defendant.

It was insisted in argument that the sale of goods as above stated constituted an entire contract; that being entire it is void by the statute prohibiting the sale of spirituous liquors, and that the presiding judge erred in allowing the amendment.

It was held in Drew v. Blake, 38 Maine 528, that in a suit upon an account, some of the items of which were for spirituous liquors sold in violation of law, that the plaintiff might amend by striking out the items for liquor and recover on the account thus amended. The account in that case embraced some months, during which the articles were delivered, and it is urged that as they were sold at different times, they may be regarded as several sales, and that therein it differs from the case at bar. But the precise question under consideration came before the supreme court of New Hampshire, in Walker v. Lovell, 8 Foster's R. 138, and in Carleton v. Woods, 8 Foster's R. 291, where it was held that when an entire stock of goods is sold at one and the same time, but each article for a separate and distinct agreed price, the contract of sale is not to be regarded as entire and indivisible, and if the sale of some of the articles be prohibited by law, the illegality will not render the sale of the other articles illegal also. "We are unable," says Wood, J., "to see how

this case differs from the case of a sale by a merchant of various goods to his customer at one and the same time, for separate values, stated at the time, which when computed would of course amount to a certain sum in the aggregate. When in such case the goods are charged to the customer, and the sale of part of the goods should be found to be illegal, we think it would be difficult to maintain upon any legal or equitable principles that under a proper declaration the value of the goods which were proper and legal articles of sale could not be recovered."

In the case before us the defendant was to select such goods as he might choose. Each artice selected had its appropriate name. The bargain for its purchase was several and distinct. The defendant ought not to be permitted to evade the payment of articles legally sold because he may have subsequently elected to purchase other articles at an agreed price the sale of which was prohibited by statute.

Default to stand.

In the case of an alternation promise, one branch of which is legal and the other illegal, the legal branch can be enforced. Hanauer v. Gray, 25 Ark. 350.

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§ 25 (A)—Past Consideration.

DEARBORN ET AL. v. BOWMAN.

1841. 3 Met. (Mass.) 155.

ASSUMPSIT on a note. Defense, want of consideration.

SHAW, C. J.—* * * The question is, whether upon the facts shown any consideration appears for this promise. The note was given in consequence of services before that time performed by the plaintiffs in printing and circulating extra papers and documents previously to an election of state senators at which the defendant was a candidate. Such services imposed no obligation, legal or moral, on the defendant; and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election.

Nor were these services performed at the request of the defendant. On the contrary, it appears by the evidence that they were performed by General Staples, chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication, until long after the services had been performed. The rule of law seems to

be now well settled—though it may have formerly been left in doubt—that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. Mills v. Wyman, 3 Pick. (Mass.) 207; Loomis v. Newhall, 15 Pick. (Mass.) 159; Dodge v. Adams, 19 Pick. (Mass.) 429. As the services performed by the plaintiffs were not done at the request of the defendant; as they were not done in the fulfillment of any duty or obligation resting on him; there was no consideration to convert the express promise of the defendant into a legal obligation.

Another ground, however, was taken in behalf of the plaintiffs, which was that the discharge by the plaintiffs of their legal demand against Staples was a good consideration for the defendant's promise to them. If such discharge was in fact given, and given at the defendant's request; or if the defendant had promised to pay if they would discharge Staples *pro tanto,* and they did discharge him, it would have been a good consideration for the defendant's promise. But there is no evidence to establish the fact.

The court is of the opinion that there was no legal consideration for the defendant's promise, and that no action can be maintained upon it.

Plaintiffs' nonsuit.

ALLEN v. BRYSON.

1885. 67 Iowa 591, 25 N. W. 820.

BOTH parties were attorneys at law, and this action was brought to recover for professional services performed by the plaintiff for the defendant. Verdict and judgment for the plaintiff. Appeal.

SEEVERS, J.—* * * The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same.

In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being paid therefor, that a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay, and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which because of the lapse of time or for other reasons cannot be enforced, the moral obligation is sufficient to support a subsequent promise will be conceded.

These cases are distinguishable because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed: Cook v. Bradley, 7 Conn. 57; Williams v. Hathaway, 19 Pick. (Mass.) 387; Dawson v. Dawson, 12 Iowa 515; McCarty v. Hampton Building Assn., 61 Iowa 287, S. C. 16 N. W. 114. * * *

Reversed.

SHEPHERD v. YOUNG, ADMR.

1857. 8 Gray (Mass.) 152.

PLAINTIFF had supported a destitute infant grandchild. The child was killed in a railroad accident and damages recovered by its administrator. Action of contract on a claim for board of the child with a count on a special promise by its administrator to pay the claim.

BIGELOW, J.—The facts in this case do not show any valid debt by the infant intestate to the plaintiff. The board of the child was clearly a gratuity, furnished from motives of affection and kindness by the plaintiff, without any expectation of remuneration or intent to make a claim in the nature of a debt. There is therefore nothing

on which an implied contract can rest to charge the assets of the intestate in the hands of the defendant. Osborne v. Governors of Guy's Hospital, 2 Stra. 728; Pelly v. Rawlin, Peake's Add. Cas. 226; Dearborn v. Brownson, 3 Met. (Mass) 155; McGilvery v. Capen, 7 Gray (Mass.) 524, 525.

Nor can the plaintiff maintain her action against the defendant as administrator to charge assets in his hands on the express promise of the defendant. It was wholly without consideration and void, as *nudum pactum*. Besides it was not competent for the defendant, by his promise, to bind the assets in his hands as administrator, to pay a claim which was not valid as against the estate of his intestate. Washburn v. Hall, 10 Pick. (Mass.) 431; Ripley v. Sampson, 10 Pick. (Mass.) 373.

Judgment for the defendant.

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§ 25 (B)—Consideration Preceded by Request, When Enforceable.

MOORE v. ELMER.

1901. 180 Mass. 15, 61 N. E. 259.

BILL by Josephene L. Moore against Nelson L. Elmer and others, as administrators, etc., based upon the following promise:

"Springfield, Mass., January 11, 1898. In Consideration of Business and Test Sittings Received from Mme. Sesemore, the Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I, the undersigned, do hereby agree to give the above named Josephene or her heirs, if she is not alive, the Balance of her Mortgage note which is the Herman E. Bogardus Mortgage note of Jan. 5, 1893, and the Interest on same on or after the last day of Jan., 1900, if my Death occurs before then which she has this day Predicted and Claims to be the truth, and which I, the undersigned, Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death occurs before 1900. Willard Elmer."

HOLMES, C. J.—It is hard to take any view of the supposed contract in which, if it were made upon consideration, it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and

would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for. See Langd. Cas. Cont. § 92 *et seq.*; Chamberlin v. Whitford, 102 Mass. 448, 450; Dearborn v. Bowman, 3 Met. (Mass.) 155, 158; Johnson v. Kimball, 172 Mass 398, 400, 52 N. E. 386.

It may be added that even if Elmer was under a previous liability to the plaintiff it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill. It is not necessary to consider what further difficulties there might be in the way of granting relief.

Bill dismissed.

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§ 25 (C)—Ratification of Assumed Agency.

GLEASON v. DYKE.

1839. 22 Pick. (Mass.) 390.

DEFENDANT gave a note and mortgage to an insurance company. His equity of redemption was sold to plaintiff for the amount due on the note. The note and mortgage were cancelled and with a release of the mortgage were delivered to the plaintiff by the insurance company. Before this release was made defendant knew that plaintiff had paid the amount due on the note, and some days thereafter promised him to pay the same. On the trial defendant contended that without a previous request to pay the note such a promise was not sufficient to sustain this action; and the judge, for the sake of convenience, so ruled. If the court should be of opinion that such a promise was sufficient to sustain the action, the defendant was to be defaulted, and judgment to be rendered for the plaintiff, for the amount paid on the note, with interest from the time of payment.

WILDE, J.—There was no express proof that the note to the Massachusetts Hospital Life Insurance Company was paid at the request of the defendant; but the plaintiff relied on the promise of the defendant to pay him, made subsequently to the discharge of the mortgage. This promise, we think, is equivalent to a previous request. It comes within the well established principle that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority. The law, it is true, will not allow a party to maintain an action for money paid

to discharge the debt of another without his consent; for to allow this would subject every debtor to the power of those who might be disposed to injure him, and who might harass him with suits, and burden him with costs, in the most unreasonable and oppressive manner. But if the debtor assents to the payment, the reason of the law fails; and whether the consent be given before or after the payment is, as it seems to us, immaterial. Yelv. (Metcalf's ed.) 42n. We have no doubt, therefore, that the defendant's promise is valid; because his ratification of the payment is equivalent to a previous request to pay, and the objection, that the consideration was past, cannot be maintained. * * *

Default entered.

This rule of agency has no application where one pays by mistake the debt of another, as, for instance, a tax on another's land, supposing it was a tax on his own land. Mass., etc., Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202.

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§ 25 (D)—Renewal of Promise Which Could Not be Enforced by Reason of Some Rule or Provision of Law.

STEBBINS v. CRAWFORD COUNTY.

1879. 92 Pa. St. 289.

STEBBINS was county treasurer. He settled his accounts and the auditors' reports thereon were properly filed and became a judgment which was not appealed from by any of the parties interested. It was afterwards discovered that there were errors in these accounts to the extent of $1,771.76, and Stebbins, who had no knowledge of these errors prior thereto, admitted them and acknowledged the mistake to that amount and promised to pay the same. The county brought assumpsit on this promise.

The following was a portion of the opinion of the court below per Church, P. J. * * *

"The facts are that two years after the auditors' report was filed, and which was unappealed from, and hence final and conclusive, and binding as a judgment upon all parties, the defendant, upon the discovery of two important clerical and mathematical errors, admitted the errors and promised to pay the same definitely, specifically and unconditionally. Was there a moral obligation resting on the defendant to pay this money, sufficient for a consideration to support this promise, or was it void as being mere *nudum pactum?* From an examination of the authorities we find the rule to be this: A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by pos-

itive law. Express promises, founded on pre-existing equitable obligations, may be enforced as founded on good consideration. They merely remove an impediment erected by law to the recovery of debts honestly due, but which the statute law and public policy protect the debtors from being compelled to pay. "The case of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are illustrations of this rule. In all these cases there was originally a *quid pro quo,* and according to the principles of natural justice, the party receiving ought to pay, but the legislature has said he shall not be coerced. Then comes the promise to pay the debt that is barred; the debt of the infant, the debt of the discharged bankrupt, to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon antecedent valuable consideration. Such promises, therefore, have a sound legal basis. They are not promises to pay something for nothing, not naked pacts, but the voluntary revival or creation of obligations which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience: per Parker, C. J., in Mills v. Wyman, 3 Pick. (Mass.) 207. To the same effect is Willing v. Peters, 12 S. & R. (Pa.) 177; Hemphill v. McClimans, 12 Harr. (Pa.) 367; Kennedy v. Ware, 1 Barr (Pa.) 445; Paul v. Stackhouse, 2 Wright (Pa.) 302. Now, applying this rule to the facts in this case, what do we have? An actual pre-existing debt owing by this defendant to the plaintiff —a debt for trust moneys, which, *in foro conscientiæ,* is of a higher character than the ordinary debts which arise on account of dealings between individuals. This debt is barred by positive law by a judgment entered, in which the debtor is unwittingly, but none the less positively, released. According to the common sense and feeling of mankind, the debt exists until it is actually paid; the mind of the defendant assented to this principle. He felt the obligation of the unsatisfied debt, and in the language of the verdict, specifically and definitely admitted it, and positively and unconditionally promised to pay it. There can be no doubt, therefore, that this moral obligation was a sufficient consideration upon which to base this promise of the defendant to pay the debt, and the legal arbitrator did not err in applying these principles." * * *

GORDON, J., delivered the opinion of the supreme court.

* * * To the well-written and carefully-considered opinion of the learned judge of the court below, we can add but little, except the approval of this court. That a moral obligation is sufficient to support an assumption to pay a debt, which cannot be collected by reason of the intervention of some positive law, as the statute of limitations, the operation of a judgment, or a discharge in bankruptcy, is a doctrine now so well established that a discussion of it would be mere waste of logic. In Anspach v. Brown, 7 Watts (Pa.) 140, it is admitted that there is an obligation in morals, to pay a debt

barred by a judgment, which will support an express promise to that effect. Such a debt, it is true, is put upon a higher footing than one barred by the statute of limitations, for, it is said, there must be not only an acknowledgment of the debt, but a distinct and formal promise to pay; nevertheless, when these conditions are complied with, the promise is binding. What, then, though the auditors' report was equivalent to a judgment? That there was a clear mistake in it of some $1,700, is not denied; and that Stebbins acknowledged that mistake, and clearly and unconditionally promised to pay the amount thus discovered to be due the county, is found by the legal arbitrator. * * *

Judgment in favor of the county affirmed.

REED v. BATCHELDER.

1840. 1 Met. (Mass.) 559.

ASSUMPSIT on a promissory note made by the defendant on the 16th of July, 1835, payable to Reed & Dudley, or bearer. The defense was infancy.

At the trial in the court of common pleas, before Warren, J., the plaintiff offered evidence tending to prove that in July, 1839, after the defendant was twenty-one years old, and while said note was in the hands of the promisees, the defendant made to Henry Reed, one of the promisees, a new promise to pay the same, under such circumstances as rendered him liable upon the note. The defendant objected to the admission of this evidence, but the judge admitted it, and a verdict was returned for the plaintiff. The defendant alleged exceptions. * * *

SHAW, C. J.—The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities; but in general it may be said that the tendency of modern decisions is, to consider them as voidable, and thus leave the infant to affirm or disaffirm them, when he comes of age, as his own views of his interest may lead him to elect. 2 Kent Com. (3d ed.) 235.

It seems to be established, in Massachusetts, that the note of an infant is voidable only and may be regarded as a good foundation for a new promise when he comes of age. Whitney v. Dutch, 14 Mass. 457; Martin v. Mayo, 10 Mass. 137; Thompson v. Lay, 4 Pick. (Mass.) 48. And it is held in New York that the negotiable note of an infant is voidable and not void, and may be ratified and confirmed after he comes of age. Goodsell v. Myers, 3 Wend. (N. Y.) 479.

The only remaining question is, whether, as this was a negotiable note payable to Reed & Dudley, or bearer, and ratified by a new promise to them whilst they remained the holders, they could make

a good title by delivery to the plaintiff, Robert Reed, so as to enable him to bring the action in his own name.

The new promise to pay was made to Henry Reed, of the firm of Reed & Dudley. The effect of this was to ratify and confirm the contract and give it the same legal effect as if the promisor had been of legal capacity to make the note when it was made. This made it a good negotiable note from that time, according to its tenor, transferable by delivery; of course, when transferred to Robert Reed, the plaintiff, he took it as a negotiable note, and may maintain an action on it. This deprives the promisor of none of his immunities as an infant, because the law considers him as having full capacity when the ratification was made, and without such ratification no action would lie.

Exceptions overruled.

WAY v. SPERRY.

1850. 6 Cush. (Mass.) 238.

THIS was an action of assumpsit to recover the amount of three promissory notes. The defendant pleaded the general issue, and in defense relied on the statute of limitations and a discharge in bankruptcy. Verdict for plaintiff. Defendant excepted.

METCALF, J.— * * * We take it to be well established that in actions brought on promises made by infants, and ratified after they come of age, on promises which have been renewed after the statute of limitations has furnished a bar, and on unconditional promises by discharged insolvent debtors and bankrupts, to pay debts from which they have been discharged, the plaintiff may declare on the original promise; and that when infancy, the statute of limitations, or a discharge in insolvency or bankruptcy is pleaded or given in evidence as a defense, the new promise may be replied or given in evidence in support of the promise declared on; that a replication alleging such new promise is not a departure, and that evidence thereof is not irrelevant. And we do not hold that a note, promise, or debt is "destroyed" by a discharge in bankruptcy. If it were, it not only could not be renewed or revived, but it could not be a consideration for a new promise. Yet nothing is clearer, on authority, than that the old debt is a sufficient consideration for such promise. In all the cases above mentioned the new promise operates as a waiver, by the promisor, of a defense with which the law has furnished him against an action on the old promise or demand. Maxim v. Morse, 8 Mass. 127; Foster v. Valentine, 1 Met. (Mass.) 522, 523.

We cannot perceive any legal difference, as to the point now in question, between the case of a debt that has been discharged by a

process in bankruptcy and a claim voidable on the ground of infancy or barred by the statute of limitations. In the latter case it has been decided that a new promise removes the statute bar, but does not create a new and substantive cause of action which is the basis of a judgment; and that the judgment must be considered as rendered on the old contract. Ilsley v. Jewett, 3 Met. (Mass.) 439. And where an infant gave a negotiable note, which he ratified by a new promise after he was of age, it was decided that he was liable on it to an indorsee to whom the payee negotiated it after the ratification. The court said the ratification gave the contract "the same effect as if the promisor had been of legal capacity to make the note when he made it. This made it a good negotiabe note from that time, according to its tenor; of course, when transferred to the plaintiff he took it as a negotiable note, and may maintain an action on it." Reed v. Batchelder, 1 Met. (Mass.) 559. And the indorsement of a note, after a new promise to the payee has taken it out of the statute of limitations, enables the indorsee to sue the maker. Little v. Blunt, 9 Pick. (Mass.) 488, and 16 Pick. (Mass.) 359. The same rule is applicable to the case at bar. A new promise made to the payee of a negotiable note is a promise to pay him or order, or bearer, according to its tenor.

Exceptions overruled.

MARSHALL v. TRACY.

1874. 74 Ill. 379.

SCOTT, J.—The declaration in this case is in assumpsit and contains only the common counts. Appellant pleaded his discharge in bankruptcy as to the several causes of action, to which appellee replied a new promise since the discharge, and on that plea issue was joined. With the declaration an itemized account was filed. Appellee offered, and read without objection at the time, as evidence, a promissory note of appellee. He also offered to read a chattel mortgage, which recited an indebtedness, but objections being interposed the same were sustained.

One question raised was, whether appellee could declare on the original cause of action, or whether he was bound to declare specially on the alleged new promise. Chitty, in his work on Pleading, states the rule to be "when the subsequent promise is effectual it is sufficient to declare upon the original consideration, unless where the promise is conditional, in which case it seems to be necessary for the creditor to declare specially."

The authorities are not all harmonious on this question, but the doctrine best sustained by authority is that the original cause of action is not destroyed by the discharge in bankruptcy. The bar which

the discharge interposes may be removed by an unconditional new promise and the debt revived upon the original consideration. Shippey v. Henderson, 14 Johns. (N. Y.) 178; Way v. Sperry, 6 Cush. (Mass.) 238; 1 Chitty's Pleading 54.

In Way v. Sperry it was decided an unconditional promise by the maker of a promissory note to pay the same to the payee imparted to it again the quality of negotiability, although the promise was founded on no new consideration and was not in writing.

In the case at bar the new promise to pay, if one was made, removed the bar created by the discharge in bankruptcy, and hence the note was competent evidence, under the common counts, as an original cause of action. * * *

Judgment affirmed.

ROSS v. HURD.

1877. 71 N. Y. 14.

ANDREWS, J.— * * * If an indorser, with full knowledge of the laches of the holder in neglecting to protest a note or bill, unequivocally assents to continue his liability, or to be responsible, as though due protest had been made, he is held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand and notice. This assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by the indorser to pay the note or bill, after he had been discharged by the failure to protest it, will bind the indorser, provided he had full knowledge of the laches when the promise was made. A promise made under these circumstances affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder; and the law, without any new consideration moving between the parties, gives effect to the promise. The assent of the indorser to be bound, notwithstanding he has not been duly charged, may be established by any transaction between him and the holder which clearly indicates this purpose or intention. In Duryee v. Dennison, 5 Johns. (N. Y.) 248, the action was against an indorser who had not been regularly charged by demand and notice. No demand of payment was made until the day after the note became due. To avoid the defense based on this ground it was shown that after the note became due the attorney for the plaintiff called on the defendant and informed him of the non-payment by the maker, and that the plaintiff looked to him for payment. The defendant was told at the same time that the demand and notice was irregular, but the defendant "agreed to consider the demand and notice as made in due time, and himself liable as indorser." The

court held that this was equivalent to a promise of payment and authorized a verdict for the plaintiff. Kent, Ch. J., said: "We are of opinion that the testimony of Aiken, as given at the trial, was sufficient to support the verdict. The law is now settled that if an indorser has not had regular notice of non-payment of the drawer, yet if, with knowledge of the fact, he makes a subsequent promise to pay, it is a waiver of the want of due notice, and assumpsit will lie." * * *

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§ 25 (E).—Promise for Benefit of Third Person.

DEAN v. WALKER.

1883. 107 Ill. 540.

CRAIG, J.—This was an action of assumpsit, brought by Algy Dean, for the use of Samuel H. Sweet and Charles Hutchinson, against Edwin Walker, to recover the amount of certain bonds, secured by mortgage on real estate in Chicago, which Walker had assumed and agreed to pay.

The facts out of which this litigation arose are, in substance, the following: In February, 1873, George F. Work, being the owner of the premises, executed a trust deed thereon to secure the payment of ten bonds of $1,000 each, payable four years after the date thereof. Afterwards, and on the 1st day of August, 1873, Work conveyed the premises by warranty deed to Henry B. Jenks. On the 18th day of November, 1873, Henry B. Jenks conveyed the premises to Algy Dean, for an expressed consideration of $27,500. This deed contains the usual clauses, and concludes, after stating that the grantor had not incumbered, or caused to be incumbered, the premises and property conveyed in any manner, as follows: "Except as to a certain deed of trust made to Henry M. Shepard, bearing date October 1, 1872, to secure a loan of $25,000, and also a certain deed of trust made to George Scoville, trustee, bearing date February 1, 1873, to secure a loan of $10,000, which said two trust deeds, and the indebtedness thereby secured, are hereby assumed, to be paid by the said party of the second part." On the 4th day of November, 1874, Algy Dean, the grantee in the last-named deed, for a consideration of $54,000 expressed in the deed, sold and conveyed the premises to the defendant, Edwin Walker. This deed contains, immediately following the description of the property conveyed, the following clause: "Subject, however, to a certain deed of trust made to Henry M. Shepard, bearing date October 1, 1872, with accrued interest thereon from October 1, 1873, to secure a loan of $25,000; and subject, also, to a certain deed of trust made to George Scoville, trustee, bearing date February 1, 1873, with accrued

interest thereon from August 1, 1874, to secure a loan of $10,000." And immediately after the *habendum et tenendum* clauses in the deed is contained the following assumption: "Subject, however, to the two trust deeds, the taxes and claims aforesaid, all of which the said party of the second part hereby assumes and agrees to pay as part of the consideration of this conveyance." Sweet and Hutchinson having purchased a portion of the bonds secured by the deed of trust named in the assumption clause, this action was brought in the name of Dean, for their use, to recover the amount of the same from Walker, who had assumed payment by the clause contained in the deed under which the premises were conveyed to him.

It will be observed that Walker did not sign the deed under which the property was conveyed to him, and which contained the assumption clause, but he accepted the instrument and placed it upon record. The law did not require Walker to sign and seal the deed himself in order to make its terms and conditions binding upon him. The acceptance of such a deed, with a knowledge of its contents, binds the grantee as effectually as though the deed had been *inter partes* and had been executed by both grantor and grantee. (Crawford v. Edwards, 33 Mich. 354.) Thorp v. Keokuk Coal Co., 48 N. Y. 255, is also an authority in point. It is there said: "In the deed from Franklin to it the defendant expressly assumed to pay the plaintiff's mortgage, and this, as it is now well settled, binds the defendant to the same extent as if it had also signed the deed."

Deeds of land made subject to a mortgage, and deeds containing an assumption clause purporting to bind the grantee to pay an existing incumbrance, have been the source of much discussion in the courts in regard to the rights and duties of the grantor, grantee, and the person holding the incumbrance on the property conveyed. A deed made subject to an outstanding mortgage creates no personal liability on the grantee to pay off the incumbrance in the absence of a contract to pay, or unless the amount of the mortgage has been deducted from the purchase price and left in the hands of the grantee. (Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 *id.* 375; Jones on Mortgages, § 748.) Thus far the law seems to be well settled. Where, however, a deed contains a clause in which the grantee assumes an incumbrance on the premises conveyed and agrees to pay the same, and an action is brought to enforce such a contract, the questions growing out of such a transaction have been attended with more difficulty. But we think the law may be regarded as well settled where A has given a mortgage on a tract of land to B, and subsequently conveys to C, the deed containing a contract that C assumes the mortgage and agrees to pay the same, that B may compel the grantee to pay the mortgage indebtedness either by a suit at law or by a bill in equity foreclosing the mortgage and a personal decree against the mortgagor and the purchaser of the mortgaged premises for any deficiency. Jones on Mortgages, § 741, in discuss-

ing the relation of the parties in such a case, says: "A purchaser who assumes the mortgage becomes, as to the mortgagor, the principal debtor and the mortgagor a surety; but the mortgagee may treat both as principal debtors, and may have a personal decree against both." But whether this is the true situation of the parties or not, where the mortgagor, who is bound for the payment of a sum of money secured by mortgage on land, conveys the same, and the grantee, by a clause in the deed, assumes the payment of the mortgage indebtedness, no reason is perceived which will prevent the mortgagee, for whose benefit the clause in the deed is inserted, from maintaining an action upon such a contract against the grantee.

It is a familiar rule, and one well sustained by authority, that where one person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon it. It is not necessary in such a case that there should be any consideration moving from the third person for whose benefit the promise is made, or that there should be any privity between them. The conveyance of the land is the consideration for the promise, and the fact that the consideration moves from the mortgagor is a matter of no moment. This is well illustrated in Brown v. Dyer, 7 Cush. (Mass.) 337, where it is said: "Upon the principle of law long recognized and clearly established, that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law operating upon the acts of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

But it is said a third party can not bring an action in his own name on a contract under seal between third parties, and in support of this, Moore v. House, 64 Ill. 162, is cited and relied upon. In the case cited it was held that a covenant can not be sued upon by the person for whose benefit it is made if he is not a party to the deed. In the same case it is also held that where a contract not under seal is entered into by two for the benefit of a third person, it is a general principle the latter may sue thereon in his own name, although the agreement may not be directly to or with him. What is said in relation to an action on a sealed instrument is merely a reiteration of the common-law rule on that subject when the case was decided, but since that case was decided the rule of the common law on that subject has been changed by § 19 (33), chapter 110, of the Revised Statutes of 1874, so that now it is immaterial, for the purpose of bringing the suit, whether the contract is under seal or not. Chitty, in his work on Pleading (vol. 1, p. 4), says: "If the instru-

ment be not under seal it seems to be a general principle that the party for whose sole benefit it is evidently made may sue thereon in his own name, although the engagement be not directly to or with him."

As our statute has, therefore, abolished the distinction between contracts under seal and those not under seal (except penal bonds), so far as bringing an action on such contracts is concerned, the law, as declared by Chitty, applies as well to contracts under seal as to those not under seal. Indeed, we do not understand that the proposition is denied in the argument that if Jenks had been bound to pay the mortgage indebtedness the assumption clause in his deed to Dean would have imposed a liability on Dean; and, also, the assumption clause in the deed from Dean to Walker would have rendered Walker liable for the indebtedness. But it is contended as Jenks held title to the equity of redemption without any personal liability resting upon him to pay the mortgage, the assumption clause in his deed to Dean imposed no obligation on Dean, and as Dean was, therefore, under no legal obligation to pay the debt the assumption clause in his deed to Walker created no liability on him; in other words, the position is that a grantee of mortgaged premises can not be made liable to pay the mortgage indebtedness by an assumption clause in the deed however strong the intent may be expressed by the language used, unless the grantor is himself, at the time of making the deed, liable for such indebtedness. We are aware of the fact that there are cases which sustain this view of the law, such as Trotter v. Hughes, 12 N. Y. 74, King v. Whitely, 10 Paige (N. Y.) 465, and the late case of Vrooman v. Turner, 69 N. Y. 280, but we are not inclined to follow them. The New York cases are predicated upon the principle that where the grantor is liable for the mortgage indebtedness, and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the situation of a mere surety for him as to the payment of the mortgage indebtedness. Such being the relative situation of the parties, in equity the creditor, who is the mortgagee, is entitled to the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others has received for his indemnity to relieve him or his property from liability for such payment. (10 Paige (N. Y.) 468.)

It is quite true that this principle of equity could not be invoked and this remedy in equity made available if the grantor of the mortgaged premises was not himself liable for the mortgage indebtedness, for the reason that the relation of principal debtor and surety would not exist between the grantor and grantee. But is there no principle of law upon which the grantee may be rendered liable upon a contract which he has deliberately made upon a valid consideration? We think there is—that it may be placed on the broad and

well settled principle that where one person makes a promise to another, based upon a valid consideration, for the benefit of a third person, such third person may maintain an action upon it. Here, it was not necessary that any consideration should pass from the owners of the mortgages to Walker; it was enough that his contract was based upon a consideration which moved from Dean to him. A portion of the purchase price of the land was left in his hands, in consideration of which he agreed with his grantor, Dean, to pay the mortgages. It was a matter of no consequence to him whether Dean was legally bound to pay those mortgages or not. Dean had the right to make such a disposition of the purchase money as he saw proper in selling the land. He might have directed that the purchase money should be paid by Walker to some public charity, to a church or a college; and if Walker, in making the purchase, agreed to pay the purchase money to any or either of these objects no reason is perceived why he might not be compelled to perform his contract. It was no concern of his to whom the purchase money should be paid. Dean had the right to make such disposition of it as he saw proper, and when, for some reason known to himself, he saw proper to direct that the mortgages on the land should be paid from the purchase money which Walker agreed to pay for the premises, and Walker expressly agreed to pay for these mortgages, it is a matter in which he is in no manner concerned, whether Dean was legally liable to pay such mortgage indebtedness or not. It was enough that he, for a valuable consideration, assumed the mortgages and agreed to pay the same.

The questions here involved arose in a recent case in Pennsylvania (Merriman v. Moore, 90 Pa. St. 79), and it was there expressly held that it was not necessary to a recovery that the grantor should be himself liable to pay the debt; that the vendor had the right to direct to whom the purchase money might be paid, and if the vendee agrees, for a valuable consideration, to make payment according to the directions of the vendor he can not set up as a defense that the vendor was not bound to pay. In deciding the case it is said: "A vendor may direct how the purchase money shall be paid. He may reserve it to himself (donate it to a public charity, or may make such other disposition of it as may best meet his views; and if his vendee agrees to pay it according to such directions, he can not set up as a defense that his vendor was under no duty to apply it in such manner."

What right has Walker to question the validity of the mortgage which he assumed and agreed to pay? In Pidgeon v. Trustees of Schools, 44 Ill. 501, where Mansfield and wife executed a mortgage upon their homestead without the statutory waiver, and afterwards conveyed to Pidgeon, the deed containing a clause that as a part of the consideration money he was to pay the mortgage, it was held, in a suit to foreclose, that the grantee having obtained a deed of the premises by admitting the lien and assuming its payment, he was

estopped from setting up as a defense the omission of the mortgagors to release their homestead right. In Crawford v. Edwards, 33 Mich, 354, where mortgaged premises were conveyed, the deed containing an assumption clause, it was held that the grantee was not at liberty to show in defense that the mortgage he had assumed and agreed to pay was without consideration and therefore not a valid claim against his grantor. In Comstock v. Smith, 26 Mich. 306, a similar question arose, and it was there held that where one has purchased lands, and as a part of the purchase price has covenanted to pay a mortgage given by his grantor he can not avoid liability by showing that the mortgage was not enforceable against such grantor by reason of a personal disability to execute a valid and binding mortgage.

The principle which underlies the cases cited has a bearing on the case under consideration. After Walker, as a part of the consideration for the purchase of the mortgaged premises, acknowledged the validity and binding force of the mortgage indebtedness, and agreed to pay the same, what right has he to defeat a recovery by showing that his grantor was not legally bound to pay the debt? But whether we are correct in this or not, we are satisfied that the rule that it is not necessary in order to a recovery that the grantor should be liable is sound in principle and one which will promote the ends of justice and compel the due enforcement of contracts.

The judgment will be reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

STARBIRD v. CRANSTON.

1897. 24 Colo. 20, 48 Pac. 652.

GODDARD, J.—The appellants assign numerous errors upon the rulings of the court below, which, when summarized, present for our consideration the following questions: First. Can a mortgagee maintain an action at law, in his own name, to recover his mortgage debt against a grantee who accepts a conveyance of the mortgaged premises containing an agreement to assume and pay the same? * * *

Upon the first proposition there is a diversity of opinion among the courts of last resort in this country, growing out of the particular view that each tribunal has taken as to the ground of the liability of the grantee who assumes the payment of a mortgage upon the property conveyed to him, some holding that his liability depends upon the equitable doctrine of subrogation, and that the obligation he assumes can be enforced only in an equitable proceeding, while others hold that it arises out of the contract and constitutes a legal

liability, enforceable in an action at law. The latter is not only the better and more generally accepted view, but is the one that prevails in this jurisdiction. Green v. Morrison, 5 Colo. 18; Skinner v. Harker, 23 Colo. 333, 48 Pac. 648; Investment Co. v. Palmer, 8 Colo. App. 132, 45 Pac. 237; Burbank v. Roots, 4 Colo. App. 197, 35 Pac. 275; Stuyvesant v. Investment Co., 22 Colo. 28, 43 Pac. 144. Mr. Pomeroy, in discussing the rationale of the grantee's liability, in his work on Equity Jurisprudence, uses the following language: "The ground of grantee's liability adopted by the courts of a large majority of the states is that of contract. It is an application of the general doctrine so widely prevailing in this country that may properly be called an American doctrine. Where A makes a promise directly to B, for the benefit of C, upon a consideration moving alone from B, C, being the party beneficially interested, may treat the promise as though made to himself, and may maintain an action at law upon it in his own name against A, the promisor. According to this generally accepted view, the liability of the grantee, who thus assumes the payment of an outstanding mortgage, does not depend upon any extension of the equitable doctrine concerning subrogation. It is strictly legal, arising out of a contract binding at law. The mortgagee, instead of forcing the liability by a suit in equity for a foreclosure, may maintain an action at law against the grantee upon his promise and recover a personal judgment for the whole mortgage debt." 3 Pom. Eq. Jur., § 1207. Among the adjudicated cases announcing this rule are Burr v. Beers, 24 N. Y. 178; Thorp v. Coal Co., 48 N. Y. 253; Dean v. Walker, 107 Ill. 540; Bay v. Williams, 112 Ill. 91; Schmucker v. Sibert, 18 Kan. 104; Urquhart v. Brayton, 12 R. I. 169; Ross v. Kennison, 38 Iowa 396; Rogers v. Gosnell, 58 Mo. 589; Merriman v. Moore, 90 Pa. St. 78; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Bassett v. Hughes, 43 Wis. 319; Bliss, Code Pl., § 128.

But it is strenuously insisted by counsel for appellants that a distinction should be made where the assumption agreement is contained in a deed, as in this case, upon the theory that the assumption clause must be treated as a covenant, and that an action on a covenant will only lie in the name of the covenantee. But this technical rule of the common law does not prevail in states that have adopted the reform procedure. Under our code, the action must be prosecuted in the name of the real party in interest, and certainly the beneficiary or person for whose benefit the promise is made is the real party in interest, whether the promise is evidenced by a simple contract or one under seal. Pom. Rem. & Rem. Rights, § 139; Bliss, Code Pl., § 58; McDowell v. Laev, 35 Wis. 171; Bassett v. Hughes, *supra;* Fitzgerald v. Barker, 70 Mo. 685; Emmitt v. Brophy, 42 Ohio St. 82; Van Schaick v. Railroad Co., 38 N. Y. 346; Lawrence v. Fox, 20 N. Y. 268. In these cases and many others that might be cited, the old rule that no one but a covenantee could sue on a

covenant is distinctly repudiated; and it is held that a grantee who accepts a deed poll containing an assumption agreement to pay a mortgage becomes personally liable to the mortgagee, who may maintain a suit in his own name upon such covenant or agreement for the mortgage debt. We think, therefore, the first question must be answered in the affirmative. * * *

In New York and some other states the general rule has been qualified by the requirement that the promisee must be under some existing legal or equitable duty to the third person.

In these states it is held that the grantor of property must have been personally liable to pay the secured debt. Vrooman v. Turner, 69 N. Y. 280; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49. And in Massachusetts and a few other states the rule has been in most cases repudiated. Borden v. Boardman, 157 Mass. 410, 32 N. E. 469; Creesy v. Willis, 159 Mass. 249, 34 N. E. 265.

MARBLE SAV. BANK v. MESARVEY.

1897. 101 Iowa 285, 70 N. W. 198.

KINNE, C. J.— * * * A somewhat extended examination of the decision in other jurisdictions, as well as an investigation of the law as laid down by leading authors, reveals the fact that there is much disagreement as to the grounds upon which one who is not primarily liable to pay the mortgage debt, but purchases the mortgaged premises, and agrees to discharge said debt, is held liable. In some cases it is held that the contract to pay the mortgage operates as a collateral security, obtained by the mortgagor, which by the subrogation inures to the benefit of the mortgagee. And so it has been held that the mortgagee can recover a personal judgment only against the person who agreed to pay the debt when the mortgagor holds an obligation which will support the judgment. 1 Jones, Mortg., § 761a. In some states, and we think in most of them, it is held that the one assuming payment of the debt is liable upon the broad principle that a promise of one person to another for the benefit of a third person may be enforced by the latter. 1 Jones, Mortg., § 758; 3 Pom. Eq. Jur., § 1207; 1 Beach, Mod. Cont., §§ 196, 197-200, and notes. This is the recognized doctrine in this state. Gilbert v. Sanderson, 56 Iowa 352, 9 N. W. 293; Ross v. Kennison, 38 Iowa 396, and cases cited. It is held, however, in some of the states adhering to the rule last stated, that there can be no recovery in such a case unless the grantor is personally liable upon the mortgage which his grantee assumed to pay. Hence it is said that "such a covenant, made by one to whom the premises are con-

veyed, after several conveyances have intervened since the conveyance by the mortgagor, cannot be enforced by the holder of the mortgage unless the grantor in whose deed payment was assumed had himself assumed the payment of the mortgage debt, or made himself personally liable for it in some way." 1 Jones, Mort., § 760; 1 Beach, Mod. Cont., §§ 200-202, and notes. This is the rule contended for by appellants in this case. It is therefore simply a question whether the obligation assumed by one who purchases the mortgaged premises and agrees to pay the mortgage debt shall be held to be available to the mortgagee or his assignee in all cases, or only in cases where the purchaser's immediate grantor is personally liable for the payment of the debt. The latter is the rule in New York and some other states. Upon principle we discover no reason for limiting the application of the rule to recovery to cases wherein the immediate grantor is personally liable to the mortgagee or his assignee.

The theory upon which personal liability to a third person, not a party immediately to the contract, is based, is that one may lawfully agree with another to pay a third person, and that in such a case no consideration need pass to such third person, nor need he even know of the arrangement. The consideration for this land, in part, was the discharge or payment of this mortgage by the purchasers. As between the purchasers and their grantor there can be no question that such grantors could enforce the contract. Now, surely such grantors have the right, if they wish, to direct the application of the purchase money; and it is therefore a matter of no concern to such a purchaser who agrees to pay the mortgage debt as to whether his grantor is personally liable to pay said debt. We discover no reason for limiting recovery to a case where the purchaser's immediate grantor is under a personal obligation to pay the mortgage debt. * * *

GILBERT v. SANDERSON.

1881. 56 Iowa 349, 9 N. W. 293.

In this case a third person, Sanderson, by agreement with the mortgagor, Warner, alone, agreed to settle and discharge an outstanding mortgage when it became due. Before the mortgagee, Smith, had knowledge any such contract was in existence, the parties who made it agreed upon a valuable consideration to release the obligation thereby assumed.

Seevers, J.— * * * Conceding the mortgagee, Smith, or the plaintiff, his assignee, could avail themselves of the benefits conferred by the contract, the remaining question is whether the mortgagor, Warner, for a valuable consideration, could release and dis-

charge the defendant from the obligation if done before the mortgagee or his assignee had knowledge of or accepted the contract, or whether it was irrevocable unless the mortgagor or the plaintiff assented to the revocation.

The authorities are not agreed as to the grounds upon which the person agreeing to pay the mortgage is held liable. In some of the adjudicated cases it has been held the contract of indemnity, or to pay the mortgage, operates as a collateral security obtained by the mortgagor, which, by equitable subrogation, enures to the benefit of the mortgagee. This being so it has been held to follow that the mortgagee can only recover a personal judgment against the person who agreed to pay the debt when the mortgagor holds an obligation which will support the judgment. 1 Jones on Mortgages, § 762; Crowell v. Currier, 12 Green (27 N. J. Eq.) 152.

In the case at bar, Warner, the mortgagor, had released the defendant from all liability on the contract. Therefore the doctrine of subrogation cannot apply, for the reason the contract as to Warner must be regarded in the same light as if it had never existed. There is nothing upon which a judgment can be supported. In New York there are cases which hold the liability is incurred on the ground above stated, and others which hold it is incurred upon the broad principle that if one person makes a promise to another for the benefit of a third person, the latter may maintain an action on each promise. Gamsey v. Roberts, 47 N. Y. 232. It is upon this last ground, it is said, the cases in this state are based. Ross v. Kennison, 38 Iowa 396. There is dicta in Gamsey v. Roberts, it is said, indicating the contract is irrevocable unless the mortgagee assents to the revocation. No such question, however, was in the case.

The question under consideration arose in Simpson v. Brown, 6 Hun (N. Y.) 251, and it was there held in substance the contract could not be released by the mortgagor. This case on appeal (68 N. Y. 355) was reversed on several grounds, among which was that the mortgagor could release the indemnity before it had been assigned to the mortgagee, or came into his hands. To the same effect is Stevens v. Casbacker, 8 Hun (N. Y.) 116. It has also been held when one person makes a promise to another for the benefit of a third person, the person to whom the promise is made may execute a valid release of such promise before it has been accepted by the latter. Dunham v. Bischoff, 47 Ind. 211; Kelly v. Roberts, 40 N. Y. 432.

In the case at bar the contract primarily was made to indemnify the mortgagor, Warner. It may be the plaintiff was entitled to the benefits of the contract, but this depended upon the question whether he desired to avail himself thereof. He could not be forced to do so. Now, before he had knowledge any such contract was in existence the parties who made it agreed upon a valuable consideration to release the obligation thereby assumed. Having the power to enter into such contract, it would seem to follow they could enter into

another whereby the former ceased to be of any force or effect, unless in the meantime the person for whose benefit it was made in some manner has indicated he accepts the contract, or it can be implied he did so. By so doing he acquires the rights and assumes the burdens incident thereto. * * *

In accord: Berkshire Ins. Co. v. Hutchings, 100 Ind. 496; Brewer v. Maurer, 38 Ohio St. 543, 554; Jones et al. v. Higgins et al., 80 Ky. 409; Biddel v. Brizzolara et al., 64 Cal. 354, 30 Pac. 609; Conley v. Dazian, 114 N. Y. 161, 21 N. E. 135; Wood v. Moriarty, 16 R. I. 201, 14 Atl. 885; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099; International Trust Co. v. Mfg. Co., 40 Colo. 440, 91 Pac. 915; Commercial Bank v. Kirkwood, 172 Ill. 563, 568, 50 N. E. 219. But see Bay v. Williams, 112 Ill. 91, 97, decided by a divided court, 4 to 3.

CHAPTER III.

THE STATUTE OF FRAUDS.

THE English statute (29 Car. II, c. 3) entitled "An Act for the Prevention of Frauds and Perjuries" requires written evidence of the contracts therein mentioned before they can be enforced. This statute is commonly called the Statute of Frauds. The fourth section has been adopted with slight modifications in most of the states. In its original form it enacts—

"That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract for sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

In some of the states, including Illinois, the authority of an agent to execute a contract for the sale of real property or an interest therein for a longer term than one year must be in writing. And in some of them, including Illinois, the statute expressly provides that the consideration of the promise or agreement (within the statute) "need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence." Benjamin on Contracts, pp. 73, 83, 88; Rev. St. Ill. Ch. 59, §§ 2, 3.

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§ 26.—Is Contract Within the Statute Merely Voidable?

STONE v. DENNISON.

1832. 13 Pick. (Mass.) 1.

ASSUMPSIT for work and labor. Verdict for defendant.

SHAW, C. J.— * * * The first point taken by the plaintiff is, that the evidence of the agreement ought not to have been admitted,

because the agreement, not being to be performed within a year, and not being in writing, was void by the statute of frauds. St. 1788, c. 16, § 1.

But we think this objection is answered by the consideration that here the contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover, upon a *quantum meruit,* as upon an implied promise. But the statute does not make such a contract void. The provision is that no action shall be brought whereby to charge any person upon any agreement which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties and obligations of the parties resulting from such performance stand unaffected by the statute.

In the case of Boydell v. Drummond, 11 East 142, a case was put in the argument of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract was the payment of the price, which was not to be performed within the year, a question is made whether by force of the statute the purchaser is exempted from the obligation of the agreement, as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. "In that case," said Lord Ellenborough, "the delivery of the goods,which is supposed to be made within the year, would be a complete execution of the contract on the one part, and the question of consideration only would be reserved to a future period."

If a performance upon one side would avoid the operation of the statute, *a fortiori,* would the entire and complete performance on both sides have that effect? Take the common case of a laborer entering into a contract with his employer, towards the close of a year, for another year's service upon certain stipulated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action whereby to charge the other upon such contract. But it would be a very different question were the contract fulfilled upon both sides by the performance of the services on the one part and the payment of money on account, from time to time, on the other equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a *quantum meruit* and recover more, or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received and recover back part of the money advanced on the ground that by the statute of frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute.

We are of opinion that it has no application to executed contracts, and that the evidence of this contract was rightly admitted.

Judgment on the verdict.

But in a few of the states a verbal contract within the statute is void. See Rawl v. Smith, 61 Mich. 543, 28 N. W. 676; Popp v. Sevanke, 68 Wis. 364, 31 N. W. 916; Pierce v. Clarke, 71 Minn. 114, 73 N. W. 522.

By Whom Can Privilege of the Statute be Made Available?

GRISHAM ET AL. v. LUTRIC ET AL.

1898. 76 Miss. 444, 24 So. 169.

ACTION by T. L. Grisham and others against Lutric & Chandler.

In October, 1896, G. W. Harbour leased some lands in Madison county, verbally, for a term of three years. On the 17th day of November, 1896, Harbour gave a deed of trust on the crops to be grown on the leased premises for the year 1897 to B. F. Bustin, in which the appellant was trustee. In December following Harbour moved on the land and afterwards executed a deed of trust on the crops to be grown thereon in 1897 to B. F. Beauchamp. Harbour delivered to Beauchamp five bales of cotton raised on this land to apply on his debt to Beauchamp. Appellee bought this cotton from Beauchamp. Appellants brought this suit against the appellees to recover the value of the five bales of cotton. The court below gave peremptory instruction for defendants. From a verdict and judgment accordingly, plaintiffs appealed.

WOODS, C. J.—On the case presented in the record before us there is really only a single question for our consideration: Was the action of the trial court in declaring the trust deed of November 17, 1896, made by Harbour to Grisham, trustee, void, and in excluding it from the jury, correct? While a verbal contract for the lease of lands for more than one year is non-enforceable because within the statute of frauds, still the statute does not declare it void, but only declares that it (the contract), shall be non-enforceable in an action brought to charge a defendant or other party. But the present suit is not one brought against the defendants to enforce a verbal contract of lease for more than one year. It is not a suit brought by either of the parties to such lease against the other party thereto. The parties to the contract are neither asserting any claim based upon it, nor defending any action because the contract is within the statute of frauds. The attack upon the contract is made by way of defense in an independent proceeding between strangers to that contract, and it would appear to be well settled that attack by a stranger in a collateral proceeding is not allowable. If the contract, voidable at

the election of either party, has been performed, "third persons, having no interest in it, can not be heard to question it in any collateral controversy." Chaffe v. Benoit, 60 Miss. 34. It seems equally well settled that the statute of frauds as a defense is personal to the parties to the contract and is not available to a stranger to the contract in a collateral proceeding. In Brown, St. Frauds, § 135, we find this language: "As the statute of frauds affects only the remedy upon the contract, giving the party sought to be charged upon it a defense to an action for that purpose, if the requirements of the statute be not fulfilled, it is obvious that he may waive such protection; or, rather, that, except as he undertakes to avail himself of such protection, the contract is perfectly good against him. A third party can not, in a case where his own obligations growing out of the existence of the contract in question are concerned, deny the obligation of the contract upon the party who was charged thereby, or take any benefit of the protection which said party could claim in an action brought upon it against himself." And again, in § 138, the same author says: "It has already been shown in this chapter that the statute does not make the contract void, but only allows a defense to its enforcement, which defense is personal to the defendant, and may be waived by him, and which no third party can assume that he will or would avail himself of so as, in effect, to give the third party the privilege of the statute." In Reed, St. Frauds, § 651, it is said: "No third person can set up the statute of frauds for *non constat* that the parties will not voluntarily perform. Only the party to be charged can set up the statute." And many authorities cited in the note support the text, and to these authorities we refer, as well as to those cited in 8 Am. & Eng. Enc. Law 659, in support of the text of that work, which declares that "only parties to the agreement can take advantage of the defense of the statute." Under this view of the trust deed held by the court below, it is hardly necessary to add that the crops to be grown by the grantor in that trust deed had a potential existence.

Reversed.

Does the Statute Apply to Contracts Performed?

NILAND v. MURPHY.

1889. 73 Wis. 326, 41 N. W. 335.

COLE, C. J.— * * * The suit is brought to recover the consideration agreed to be paid for the real estate. It is objected that the action can not be maintained because the contract was for the sale of lands and, not being in writing, was within the statute of frauds. But when, in pursuance of a verbal contract, a conveyance has been

one by him duly authorized. (Cossitt v. Hobbs, 56 Ill. 231; McConnell v. Brillhart, 17 *id.* 354; Spangler v. Danforth, 65 *id.* 152; Wood v. Davis, 82 *id.* 311.) No particular form of language is necessary to constitute the memorandum requisite to satisfy the requirements of the statute. An admission in writing of the bargain having been made, although it may not furnish exclusive evidence of the contract, as a final agreement would do, or an offer in writing so stating the proposal that its mere acceptance would fix the terms of the bargain, will, if accepted, satisfy the statute, and the acceptance of the offer in writing may be shown by parol. Browne on Statute of Frauds, § 345a; Esmay v. Gorton, 18 Il. 483, and authorities *supra;* Farwell v. Lowther, 18 *id.* 252." (Lasher v. Gardner, 124 Ill. 441.)

The authorities are agreed that if the memorandum shall contain, on its face, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest or property as will be capable of identification, together with the terms and conditions of the contract, and signed by the party to be charged, it will be sufficient upon which to predicate a decree for specific performance. (McConnell v. Brillhart, *supra.*) The contract or memorandum set up in the bill, while in the nature of a receipt, clearly evidences a sale of the property therein described as having taken place from appellee to appellant, and acknowledges that $100 has been paid upon the purchase price of $14,000 by appellant. Appellant is named as the purchaser, and the text of the writing clearly designates appellee as the vendor by whom the writing is signed, so that it will be seen that the contract or writing relied upon contains all that is required by the statute, and more, as the statute does not require that the consideration shall be stated in the writing, but authorizes it to be established by parol.

It is insisted that there is no time specified for the completion of the contract, and that therefore the contract is not complete. Under such a contract the law would imply that it was to be performed within a reasonable time after entering into the same, and what would be a reasonable time would be a matter of proof under all the conditions and circumstances that might surround the case. (Gibson v. Brown, 214 Ill. 330; Driver v. Ford, 90 *id.* 595; Hamilton v. Scully, 118 *id.* 192; Biddison v. Johnson, 50 Ill. App. 173.) Time was not made the essence of the contract in question, and the bill was not obnoxious to demurrer because of the absence of the provision specifying the time in which the performance should take place. The allegation in the bill touching that matter is, that appellant, within a few days after the making of the contract, applied to appellee for performance on appellee's part, and that appellant at the same time offered to perform on his part by paying the full balance of the purchase price. * * *

It is urged that this contract lacks in the material element of mu-

tuality. The particular ground upon which this contention is based is, that the contract is signed by appellee only. It is found in option contracts, and unilateral contracts generally, that the rule here contended for has no application; that the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor and an offer to perform, renders the contract mutual and binding.

But it is said that in the particular contract before us there was no future act or option contemplated, and that the contract had all its validity at the time it was originally made, and that to entitle specific performance of such contract there must be mutuality of obligation and remedy. It is difficult to understand upon what substantial ground the difference in the rule applicable to the two sets of contract contended for, if it exists, is based. We are unable to understand why the mere written option signed by the vendor shall bind him by the verbal acceptance of the vendee and his offer to perform be held to be a mutual and binding contract within the Statute of Frauds, and the contract of sale acknowledging the receipt of part payment, signed by the vendor, shall be held void for want of mutuality upon the alleged ground that the vendee has not bound himself to perform by some writing. We are aware that there is a diversity of opinion and a contrariety of holdings by the courts of last resort in the various states upon this subject, but a careful review of the authorities leads us to conclude that a contract otherwise clear and explicit is sufficient to meet the requirements of the Staute of Frauds if signed by the vendor. In the second edition of the American and English Encyclopedia of Law (vol. 29) the subject under consideration is extensively discussed and the authorities touching it reviewed, and the conclusion there announced is (p. 858) "The weight of authority is, that the statute is satisfied if the memorandum be signed by the parties sought to be charged, alone, or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee. In the case of a contract for the sale of lands the vendor is usually the person to be charged, and a memorandum signed by him alone is valid. The party not signing the memorandum is not bound unless, as held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, as the act of filing a bill for specific performance binds the plaintiff and renders the contract mutual." A reference to the authorities there cited shows that the rule thus obtains in England and in the majority of the United States. Speaking of this rule, Mr. Pomeroy, in his work on Specific Performance (§ 75), in part says: "It may, perhaps, be sustained upon the following grounds: The Statute of Frauds does not reach the substance of contracts and render them valid or invalid. It simply furnishes a rule of evidence.

Whenever, therefore, any agreement is enforced against a defendant who has signed it by a plaintiff who has not, it cannot be said that the agreement, so far as it purports to bind the plaintiff, is a nullity. In the suit against him the statute does no more than require a certain kind of proof in case he avails himself of it as a defense. The defense, however, is wholly a personal one, and if he neglects to set it up the agreement would be established against him notwithstanding the statute. For these reasons it can not be said that a memorandum signed by one party alone is so completely wanting in mutuality that no action upon it can be sustained." Mr. Story, in his Equity Jurisprudence (vol. 2, § 736a), says: "But it is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it. If the agreement is certain, fair and just in all its parts, and signed by the party sought to be charged, that is sufficient. The want of mutuality is no objection to its enforcement." Parsons, in his work on Contracts (vol. 2, p. 290), says: "And it is now quite settled that the agreement need not be signed by both parties, but only by him who is to be charged by it. And he is estopped from denying the execution of the instrument on the ground that it wants the signature of the other party." * * *

The case of Forthman v. Deters, 206 Ill. 159, is a very late case and on all-fours with the case at bar, and in which the question now before us was fully considered, and the conclusion there reached and announced is, that where a party accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and is bound by them, and that where the contract purports to be a consummated contract the mere acceptance and adoption of the writing establishes mutuality and makes the contract binding on both parties. We deem that case conclusive of the case at bar.

We regard the rule as too well established to be open, that appellee, who is the vendor having signed the writing herein above set forth, can not defeat performance upon the ground of want of mutuality, based upon the fact, alone, that appellant, the vendee, did not sign the same. The appellant had paid part of the consideration and had offered to pay the whole of it within a few days of the making of the contract, and unless appellee, by her answer, shall show that to enforce the same would be inequitable for some reason other than the mere want of the signature of appellant to the contract, we are of the opinion that she should be required to perform. * * *

Decree reversed.

RILEY v. FARNSWORTH.

1874. 116 Mass. 223.

MORTON, J.—The memorandum in writing required by the statute of frauds must contain all the essential terms of the contract, so that the court can ascertain the rights of the parties from the writing itself without resorting to oral testimony. Tested by this rule it is clear that the memorandum signed by the defendant through his agents, the auctioneers, is not a compliance with the statute. It does not purport to give all the terms of the contract. It states that the plaintiff was the highest bidder and purchaser of house 23 Pine street for the sum of $3,850; that he had paid to the auctioneers $300 as a deposit and in part payment of the purchase money, and that the defendant agrees to "fulfill the conditions of sale." These conditions were stated orally by the auctioneers at the sale, and it can not be known except by recourse to oral testimony what they were. It is impossible to ascertain from the writing itself what the defendant has promised to do. * * *

The difficulty is that the contract of the parties was partly in writing and partly by parol, and the court can not determine whether the defendant is liable, or if liable, to what extent, without resorting to parol testimony to ascertain what were the conditions orally stated by the auctioneers at the sale. We are therefore of opinion that the memorandum is not sufficient within the statute of frauds.

Judgment for defendant.

WHITE v. DAHLQUIST MFG. CO.

1901. 179 Mass. 427, 60 N. E. 791.

HAMMOND, J.— * * * It is still further objected that, as to the Third street estate, the memorandum was not signed until the next day, and that the auctioneer had no authority at that time to bind the defendants. The general rule is that the memorandum may be signed at any time subsequent to the formation of the contract, at least before action brought. Browne, St. Frauds, § 352a, and cases cited; Lerned v. Wannemacher, 9 Allen (Mass.) 412, 416; Sanborn v. Chamberlin, 101 Mass. 409, 416. And this rule is applicable where the contract is made by an agent and the subsequent memorandum is signed by him during the existence of his agency. It has been sometimes thought that there is an exception to this rule in the case of auctioneers (see the authorities referred to in Browne, St. Frauds, § 353); but the exception is more apparent than real. The question does not turn upon the fact that the agent is an auctioneer, but upon the scope and duration of the agency. While it is

said that an auctioneer is the agent of both seller and purchaser for signing the contract, it does not follow that his agency for the one is co-extensive in its nature and duration with that of the other. The word "auctioneer" is sometimes used to designate the crier who simply calls for bids and strikes the bargain at an auction sale. His connection with the sale may begin with calling for bids and end with striking the bargain. If that be the only authority given him by seller and purchaser, it may be said that while the power to strike the bargain fairly imports authority to make his work effectual by signing the memorandum necessary to bind the parties, it also implies that that act shall be substantially contemporaneous with the sale, and as a part of it. In such a case the agency of the auctioneer is substantially ended with the auction, and his authority to bind either party by a memorandum would not extend beyond that time. And, so far as respects the purchaser, the authority of the auctioneer, as a usual rule, is confined to the actual time of the auction. It is conferred by the bid when accepted and therefore begins with the fall of the hammer. The technical ground is that the purchaser, by the very act of bidding, "calls upon the auctioneer or his clerk to put down his name as a bidder, and thus confers an authority on the auctioneer or his clerk to sign his name, and this is the whole extent of his authority." Shaw, C. J., in Gill v. Bicknell, 2 Cush. (Mass.) 355, 358. Such an authority must be exercised contemporaneously with the sale. See Browne, St. Frauds, § 353, and cases cited in the notes. But, primarily and actively, the auctioneer, as a rule, is the agent of the seller, and as to him his authority is generally more extensive and may cover a time both before and after the sale. Frequently the property is put into his hands for sale and all the details are left entirely to him. He is expected to make all the arrangements by way of public advertisement and otherwise, and to act fully at the sale, to receive the deposit from the purchaser, and to carry the transaction to the end. Such authority from a seller to an auctioneer does not end with the auction sale, but extends beyond it and until it is revoked the auctioneer may properly bind the seller by a memorandum signed within a reasonable time. He does this, not simply because he is the crier at the sale, but because his agency, by the fair understanding between him and the seller extends to the final consummation of the contract, and is not affected by the fact that he also acts as crier. In the present case, Hogan, the auctioneer, testified that he was in the real estate and insurance business, and had been for several years; that a week or ten days before the sale Dahlquist "placed the property with him for sale." Hogan advertised it by means of handbills and newspapers, and seems to have been given full authority to sell the property subject to instructions as to price. He received and kept after the auction the deposits made by the purchasers, and the evidence would fully warrant a finding that the understanding was that his agency for the defendants

should continue until the sale was completed, and that it had not been revoked at the time Hogan signed the memorandum. Upon such a finding the general rule applies, and since Hogan was acting during the continuance of his agency he could properly bind his principals by signing the memorandum. * * *

SINGLETON v. HILL ET AL.

1895. 91 Wis. 51, 64 N. W. 588.

MARSHALL, J.— * * * We think the letter written by Ranney, the agent of Hill, conveying to him respondent's proposition, and the letter from Hill to Ranney accepting the same, constitute a sufficient memorandum of the contract of sale to satisfy the statute of frauds. * * * It is not necessary that the memorandum should be formal, or in one writing or paper, or made directly between the parties to the contract. The point raised by the learned counsel for appellants that the letters were mere communications between Hill and his own agent is not material, for it is sufficient if the memorandum consists of letters passing between the vendor and a third person, who is agent for the parties or one of them. Drury v. Young, 58 Md. 546. Stone, J., discussing the question, quotes with approval from Gibson v. Holland, L. R. 1 C. P. 1, as follows: "The object of the statute of frauds is to prevent perjury in the setting up of contracts by parol evidence. With this view it requires the contract to be proved by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves or between one of them and his own agent. Indeed, one would be inclined to think a statement made by the party to his own agent would be the more satisfactory evidence of the two." * * *

ARGUS CO. v. CITY OF ALBANY.

1874. 55 N. Y. 495.

FOLGER, J.—The plaintiff seeks to recover upon an agreement which, by its terms, was not to be performed within one year from the making thereof. It can do so if the agreement or some note or memorandum is in writing and subscribed by the party to be charged thereby.

In this case the party to be charged, and whose subscription is needed, is the defendant, a municipal corporation. It is plain that

such a defendant can make no note or memorandum, nor subscribe the same, save by an officer or agent thereof. It is so also that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded as it takes place in the books kept for that purpose by its clerk or secretary. Hence it is that its agreements are rarely oral, but *paripassu* with the making of them; they are on the instant of formation put into writing, and thus a note or memorandum of them is made, and the minutes of the day's doings of the body being signed by the clerk thereof there is a subscription of the note or memorandum made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law by providing an enduring and unchanging evidence of the agreement, and it meets its letter, for there is some note or memorandum of it in writing, subscribed by the party to be charged thereby, the subscription made by an authorized agent. And so are the authorities. Johnson v. Trinity Ch. Society, 11 Allen (Mass.) 123; Tufts v. Plymouth Gold Mining Co., 14 *id.* 407; Chase v. City of Lowell, 7 Gray (Mass.) 35; Dykers v. Townsend, 24 N. Y. 57. * * *

KOPP v. REITER ET AL.

1893. 146 Ill. 437, 34 N. E. 942.

BILL by Cora E. Reiter against William P. Kopp and others to remove clouds upon her title to a lot owned by her. Answers filed, and a cross-bill for specific performance. Decree for complainant and cross-bill dismissed. Appeal.

MAGRUDER, J.—Under the facts, did Mrs. Reiter, the owner of the lot, make any such contract for its sale and conveyance as a court of equity will compel her to perform?

Section 2 (Ch. 59) of the Statute of Frauds provides as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, etc., * * * unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." It cannot be contended here that there has been any such part performance of a parol contract by payments, possession and improvements as will take the case out of the statue of frauds. The purchaser, Kopp, never took possession of the lot, nor made any improvements upon it. The only payment he made was that of the earnest money, $250. This amount, however, was not paid to Mrs. Reiter, but to Cronkrite & Co., who never had any authority from

her, written or otherwise, to make sale of the lot, or to take any other steps in regard to it.

We have held in a number of cases that in order to ascertain what sort of writing is sufficient to meet the requirements of the statute as above quoted, no form of language is necessary, if only the intention can be gathered, and that any kind of writing from a solemn deed down to mere hasty notes or memoranda in books, papers or letters will suffice, but that the writings, notes or memoranda must contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified from other property of like kind, together with the terms, conditions (if there be any), and price to be paid, or other consideration to be given; and such writing, note or memorandum must be signed by the party to be charged, or if signed by an agent the authority of such agent must be in writing signed by the party to be charged, and the contract or memorandum or note thereof made by the agent must also be in writing and signed by him. (McConnell v. Brillhart, 17 Ill. 354; Cossitt v. Hobbs, 56 *id.* 231; Wood v. Davis, 82 *id.* 311; Albertson v. Ashton, 102 *id.* 50; Chappell v. McKnight, 108 *id.* 570; Lasher v. Gardner, 124 *id.* 441.)

The only writing ever signed by Mrs. Reiter in this case was the warranty deed which she executed on or about January 7, 1891, and which remained in the hands of her husband, and was never delivered to Kopp, or to Vierling, or Hammond (who claimed to be the real purchasers in Kopp's name). We do not think that this deed can be regarded, under the facts disclosed by the record, as such a memorandum or note of a contract for the sale of the land, as is sufficient to take the case out of the statute of frauds. The contract of December 20, 1890, was executed by and between Mr. Reiter and the appellant, Kopp, but not by Mrs. Reiter, the owner of the lot. She gave her husband no written authority to act as her agent for the sale of the lot, or to sell it, or to sign any contract for the sale of it. We think that the findings of the Master, to whom the cause was referred, and whose report was confirmed by the court below, are sustained by the evidence. He finds in his report that before said contract was executed Mrs. Reiter was not consulted about it, and did not consent to it, and did not even give her husband any parol authority to sell the lot. The testimony shows that she was opposed to selling the lot and reluctantly executed the deed at the request of her husband. Although he informed her of the execution of the contract after he had signed it, yet it was never shown to her, and she never saw it until the hearing of the cause.

The master has found, and the evidence shows, that the deed was not executed with reference to the previous written contract between Reiter and Kopp, but with the understanding that Mr. Reiter was to deliver it upon receiving $3,000 in money and a note and trust deed

for $2,000. The deed simply purported to convey the premises from the grantors to the grantee for a consideration of $5,000, but it did not recite the terms of the contract or in any manner refer to the contract.

Counsel for appellant disclaim any reliance upon the undelivered deed as a conveyance of title, but contend that it is such written evidence of the contract of sale as satisfies the statute of frauds, whose object and meaning "is to reduce contracts to a certainty in order to avoid perjury on the one hand (by setting up of parol evidence which is easily fabricated) and fraud on the other," (Welford v. Beazley, 3 Atk. 503); that the non-delivery of the deed, regarded as such written evidence, is immaterial; that it is immaterial whether Mrs. Reiter did or did not intend to charge herself thereby, and that the deed was an admission in writing of what the contract was. It is true that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be so used are disclosed by the facts in the present record. The language of the statute is: "Some memorandum or note thereof." The word "thereof" refers back to the word "contract." There must be some memorandum or note in writing of the contract. Hence, if an undelivered deed executed by the owner can be regarded as meeting with the requirements of the statute, it must be a memorandum or note of the contract, or, in other words, must refer to the terms and conditions of the contract.

In Cagger v. Lansing, 43 N. Y. 550, it is said: "The counsel * * * insists that the deed executed by the intestate and delivered in escrow is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate's interest in the premises for a consideration therein expressed of $1,000, but is wholly silent as to the terms of the contract pursuant to which it was made." In Campbell v. Thomas, 42 Wis. 437, it was held that one who had deposited a deed with a third person with directions to deliver it to the grantee on the happening of a certain event, but had made no valid executory contract to convey the land, could revoke the directions to the depositary and recall the deed at any time before the conditions of the deposit had been complied with, provided those conditions were such that the title did not pass at once to the grantee upon delivery of the deed to the depositary; and it was there said: "If a person who has made a parol agreement to sell land sign an instrument in the form of a conveyance of such lands to the vendee, and deposit it in escrow, if such instrument contains the terms of the parol agreement, including the consideration, it is a sufficient compliance with the requirements of the statute of frauds."

In Swain v. Burnette, 89 Cal. 564, it was held that an undelivered deed executed in pursuance of an oral agreement of sale cannot be

regarded as a sufficient memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement. (Freeland v. Charnley, 80 Ind. 132; Parker v. Parker, 1 Gray (Mass.) 409; Overman v. Kerr, 17 Iowa 485; Cannon v. Cannon, 26 New Jer. Eq. 316; Johnson v. Jones, 85 Ala. 286.)

Many of the cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale under the statute, will thus be found, upon examination, to refer to deeds containing the terms of the contract. In the case at bar, however, as has already been stated, the deed executed by Mrs. Reiter and her husband was a simple conveyance of the lot for a consideration of $5,000, and was silent as to the terms of the contract of December 27, 1890.

Where the owner of land has signed a written contract of sale, or some writing amounting to such a contract, but has failed therein to properly describe the property, a deed executed by him but not yet delivered may be looked to as a part of the transaction and may be made to aid the prior agreement and secure its enforcement by supplying the defect in such description. Thus, in Jenkins v. Harrison, 66 Ala. 345, to which reference is made by counsel for appellant, a memorandum in writing purporting to contain the terms of a contract for the sale of land and signed by both of the parties, failed to describe the property with the certainty and definiteness requisite to a specific performance, but deeds, inoperative for want of delivery, were executed by the parties a few days afterwards which did correctly describe the land; and it was held that such undelivered deeds, and the memorandum signed by the parties might, when taken together, satisfy the requisitions of the statute of frauds, the court saying: "When the memorandum * * * is taken and read, as it must be, in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of the lands. True, the deeds do not expressly refer to the memorandum, but they were all executed as parts of a single transaction, between the same parties, having reference to the same subject-matter."

In Work v. Cowhick, 81 Ill. 317, property was struck off to appellant as the highest bidder at an administrator's sale, and the administrator's deed of the land and a note signed by the purchaser, in which she promised to pay to the administrator the purchase money "for land purchased by Elizabeth Work this day at administrator's sale," were left with a third person to be held until the purchaser should obtain personal security on the note and execute a mortgage, at which time the deed was to be delivered; it was held, in a suit by the administrator against the purchaser for a failure to carry out the sale, that the making of the deed and the signing of the note might be regarded as one transaction and that together they constituted such proof as amounted to a compliance with the statute

of frauds, the description in the deed indicating what land was referred to by the imperfect description in the note.

So, in Wood v. Davis, *supra,* written authority to an agent to sell land and the terms of a contract of sale were embodied in letters written by the owner, who also sent to the agent an executed deed to be delivered, but which was never in fact delivered; and when, after refusal by the agent to consummate the trade, suit for damages was brought by the purchaser against the owner it was held that such a contract was established as took the case out of the operation of the statute of frauds, and that although the memoranda contained no description of the land the description in the undelivered deed could be referred to to supply the defect.

It is manifest, however, that all these cases differ from the case at bar. Here the undelivered deed executed by Mrs. Reiter can not be used to supplement, or supply any defect in, a prior contract of sale, or a prior note or memorandum of a contract of sale, because there was no prior contract, or note, or memorandum, which she had signed or to which she was a party, or which she had authorized to be made. The contract of sale theretofore entered into was made by Mr. Reiter, without either written or parol authority from her. Nor can her undelivered deed, subsequently destroyed, be regarded as a ratification of the agreement made by her husband, because it was not made in pursuance of that agreement, or to carry it out, but without any reference to it.

Where, as in the case here, the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person to be delivered to the grantee upon certain terms, he may cancel the instruction given to such third person and recall the deed at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner agreeing to convey the land therein described so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds.

For these reasons we think that the decree of the circuit court was right, and the same is accordingly affirmed.

Decree affirmed.

PECK v. VANDEMARK.

1885. 99 N. Y. 29, 1 N. E. 41.

EARL, J.—The eleven letters put in evidence which passed between the plaintiff and the testator, commencing on the 4th day of October, 1879, and ending on the 3d day of December thereafter, all related to the same subject, to-wit, the marriage of the parties and the terms upon which it should be consummated. The whole correspondence was to settle the pecuniary compensation which the plaintiff was to have in consideration of her marriage to the testator. He distinctly proposed to give her by will one-half of the entire property which he should leave at his death and the use of the other half thereof for her life. She finally accepted the proposition and, relying upon the agreement thus made, married him and subsequently lived with him. These letters furnish the written evidence of the agreement required by the statute of frauds; and it matters not that the whole agreement may not be contained in one letter. The entire proposition, however, on the part of the testator was in one letter and her acceptance thereof in another. All the letters taken together show clearly what the agreement was, and they are all connected and related to each other, and thus all of them may be considered for the purpose of ascertaining what the agreement was.

In 1 Greenl. Ev. (Redfield's Ed.), § 268, the learned author says: "It is sufficient if the contract can be plainly made out, in all its terms, from any writings of the party, or even from his correspondence, but it must all be collected from the writings." In Whart. Ev., § 872, it is said: "It is enough, in order to meet the requirements of the statute, if the substance of the contract is to be inferred from writing, either by the parties or by their agent, though the writings are made up of disjointed *memoranda* or protracted correspondence." In Reed, St. Frauds, § 341, it is said: "The memorandum required by the statute of frauds may be on different papers, one of which must contain a reference to the other." And in Schouler, Dom. Rel., § 177, it is said: "Letters or correspondence before marriage may establish an ante-nuptial settlement, where they sufficiently furnish the terms of the agreement."

This contract was founded upon a sufficient consideration. The plaintiff (whose husband had been killed in the Civil War), in order to marry the testator was obliged to surrender the pension which she was receiving from the government, and this the testator knew. Both the surrender of the pension and the marriage itself furnished ample consideration for the promises of the testator. Schouler, Dom. Rel. 173; Magniac v. Thompson, 7 Pet. (U. S.) 348; Wright v. Wright, 54 N. Y. 437. The ante-nuptial agreement was, therefore, good in form and founded upon a sufficient consideration, and bound the testator.

As the testator did not perform his agreement the plaintiff was entitled to recover against his executor damages for the breach thereof. * * *

SCHNEIDER v. ANDERSON ET AL.

1907. 75 Kan. 11, 88 Pac. 525.

PETITION in an action for specific performance based on a memorandum in writing and a deed of conveyance deposited in escrow. The memorandum was as follows:

"Augusta, Kansas, ..., 19..... Anderson to receive 2,100 of Schneider. Anderson to have ½ corn, Schneider other half in field. Anderson to leave everything on farm, and to give possession October 1, 1904.

"Charles O. Anderson, George Schneider." * * *

Demurrer to petition sustained. Plaintiff brought error.

PORTER, J.— * * * The memorandum itself, it is contended, is not sufficient to satisfy the requirements of the statute. It recites that Anderson is to receive of Schneider $2,100 and is to reserve one-half of the corn in the field, is to leave everything on the farm, and give possession October 1st. What the $2,100 is for is not shown with sufficient definiteness, and the land itself is not sufficiently described. In Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536, a description of the land as the "Snow Farm" was held sufficient. But the ambiguity vanishes and all uncertainty disappears when, in connection with the memorandum, we look at the deed conveying the land to plaintiff executed by Anderson at the same time and as a part of the same transaction. The $2,100 appears at once to be the consideration for the sale of the farm, and there is no longer any uncertainty what farm he is to leave everything on and give possession of October 1st. The statute does not require that the contract shall consist of a single instrument. "Several distinct and separate writings may be construed together as containing all the terms of the contract, though only one of them be signed by the party to be charged." 29 A. & E. Enc. of Law, 850, a, c, and cases cited. See, also, Pomeroy on Contracts (2d Ed.), §§ 84, 85, 91. If from all of them the definite terms of a contract can be gathered it may be enforced notwithstanding the statute, provided the several writings relate to and are connected with the subject-matter of the contract, so that they can fairly be said to constitute one transaction. Ryan v. United States, 136 U. S. 68, Charlton v. Columbia Real Estate Co., 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, 110 Am. St. 495; Johnson & Miller v. Buck, 35 N. J. Law 338, 10 Am. Rep. 243; Ide v. Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. 17; Peck

v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Kopp et al. v. Reiter et al., 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. 156.

In Charlton v. Columbia Real Estate Co., *supra,* a duplicate lease of lands had been signed by defendant, but not delivered. The memorandum of the contract was insufficient by itself. It was held error to refuse to admit the lease in evidence, and the cause was reversed. The court said: "If all the papers, taken together, contain the whole bargain they form such a memorandum as will satisfy the statute." In Ryan v. United States, *supra,* the exact question is decided. There was a written proposal by defendant to sell, and a written acceptance by the vendee. The writings, however, were themselves insufficient to take the case out of the Michigan statute of frauds, because there was lacking a description of the land. The vendor had executed and delivered a deed to the officer of the government for examination, the United States being the vendee. Justice Harlan, speaking for the court, says: "Whatever may be said as to the effect of this deed in passing title, if it was delivered only for purposes of examination, or if the previous memorandum of sale had been for any reason fatally defective under the statute of frauds, its recitals, coming as they do from the vendor, are competent for the purpose of showing the precise locality of the property which the memorandum of sale was intended to embrace." The case of Jenkins v. Harrison, 66 Ala. 345, is cited with approval. To the same effect see Leonard v. Woodruff, 23 Utah 494, 65 Pac. 199. In Thayer v. Luce & Fuller, 22 Ohio St. 62, 74, it is said: "In this case, upon inspection and comparison of the memorandum and the deed, although no reference is made in either to the other, we find with reasonable certainty that they do relate to the same transaction, and contain fully the terms of a contract of bargain and sale between the parties." In Strouse v. Elting, 110 Ala. 132, 20 So. 123, it was held that where upon mere inspection of the separate writings an implication of their connection arises, parol evidence may be admitted to show the connection.

Both the writings here are signed by the party to be charged. They were executed at the same time and as part of the same transaction. Inspection alone shows their connection, and taken together we think they are sufficient to satisfy the statute. The memorandum and deed together show the parties the subject-matter, the promises upon both sides, the price, and consideration. These are all that are required. Pomeroy on Contracts, "Specific Performance," § 87; Hollis v. Burgess, *supra;* Brundige v. Blair, 43 Kan. 364, 23 Pac. 482; Miller v. Railroad Co., 58 Kan. 189, 48 Pac. 853; Newton v. Lyon, 62 Kan. 306, 62 Pac. 1000. The courts are at variance upon the question whether a deed alone when executed by the vendor and deposited in escrow to be delivered by the depositary to the grantee upon his paying the purchase price or performing some other condition is itself a sufficient memorandum to avoid the

statute of frauds. The cases are cited in 29 A. & E. Enc. of Law 855. A majority say that the deed alone is not a sufficient memorandum. But the better reasoning seems to be the other way.

The ground usually stated for holding that the deed is not a sufficient memorandum is that until it is finally delivered or the condition is performed it does not constitute a contract. The reason given seems to be beside the question, which, in this character of cases, is not, was there a written contract, but is there a sufficient memorandum signed by the party which is evidence that a contract existed or which tends to prove that fact. The evil the statute seeks to guard against is the use of oral evidence to prove a contract. This is obviated by the production of the deed, which is a memorandum of a contract. In Miller v. Railroad Co., *supra,* the case of Warfield v. Wisconsin Cranberry Co., 63 Iowa 312, 19 N. W. 224, is quoted as follows: "The statute was not intended to apply to written contracts, but to the enforcement of oral contracts when properly evidenced, as by the admission in writing of the party to be charged." By far the best reasoned case we have examined is Jenkins v. Harrison, *supra,* followed in Johnston v. Jones, 85 Ala. 286, 4 So. 748. It is there said: "A deed, drawn and executed with the knowledge of both parties with a view to the consummation of the contract of sale which, in itself and of itself, embodies the substance, though not all the details or particulars of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered, and its delivery postponed until the happening of some future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and the purposes of the statute of frauds." However, in the case at bar we are not compelled to look to the deed alone; and, as before observed, we think the memorandum together with the deed amply sufficient to satisfy the statute. The demurrer to the petition should have been overruled.

The claim is made by defendant in error that there was no mutuality in the alleged contract because it was signed by defendant alone. The want of mutuality arising from the failure of both parties to sign can not be successfully pleaded as a defense by the party who did sign. Guthrie v. Anderson, 47 Kan. 383, 28 Pac. 164; and the same case in 49 Kan. 416, 30 Pac. 459. The filing of a suit for specific performance constitutes an acceptance and binds plaintiff. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. 145; Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221.

The judgment will be reversed and the cause remanded, with directions to overrule the demurrer.

The memorandum may consist of telegrams. Utley v. Donaldson, 94 U. S. 29; Gaines v. McAdam, 79 Ill. App. 201.

BUSCH v. HART.

1896. 62 Ark. 330, 35 S. W. 534.

RIDDICK, J.—The decision of this case turns on the question whether the contract sued on was in writing or not. The appellant, Busch, claimed that the contract was in writing and attached to the bond at the time it was executed. Hart denied this. * * * The bond expressly refers to the fact that Hart and Busch had entered into a contract for the performance of which the bond was given, and contains the following recital, to-wit: "A copy of which contract is attached hereto and made a part hereof." At the trial the contract was exhibited by Busch attached to the bond, and, referring to the time when the bond and contract were delivered to him by Hart, he testified that "the copy of the contract was attached to the bond just as it is now." Now, if the contract exhibited by Bush was in fact attached to the bond at the time of its execution, and was the contract referred to therein, then a signing of the bond was, in legal effect, a signing of the contract also. Tonnele v. Hall, 4 N. Y. 144; Gale v. Nixon, 6 Cow. (N. Y.) 448; Mayer v. Adrian, 77 N. Car. 88; Fisher v. Kuhn, 54 Miss. 483; 2 Whart. Ev., § 872. The testimony of both Busch and Hamblin tends strongly to show that the contract exhibited by Busch was attached to the bond at the time of its execution. This is further supported by the reference in the bond to a contract attached thereto. We can find nothing in the record to contradict or impeach this testimony. It is true that Hart testifies that his contract with Busch was not reduced to writing, but he nowhere states that the contract exhibited by Busch was not attached to the bond at the time of its execution. On the contrary, when cross-examined on this point he stated that "the form of a contract attached to the bond shown him might have been attached when he delivered the bond, but that he had never signed it." It appears from his testimony that his contention that the contract was not in writing was based on the fact that he had never signed the contract itself; but this, we have seen, was a matter of no consequence if he signed the bond with the contract attached and delivered it to Busch in this condition. He does not deny that the contract exhibited with the bond was attached to it at the time he executed the bond, but only denies that he signed such contract. His assertion that this writing was not the contract is only a legal conclusion he draws from the fact that it was not signed, and is entitled to no weight as evidence.

After carefully considering the transcript we are forced to the conclusion that the undisputed testimony shows that the contract exhibited with and attached to the bond at the trial was thus attached at the time the bond was delivered to Busch by Hart. This contract having been attached to the bond at the time of its execution,

and expressly referred to therein as the contract for the performance of which the bond was given, the parties are bound by its stipulations. * * *

FREELAND ET AL. v. RITZ ET AL.

1891. 154 Mass. 257, 28 N. E. 226.

LATHROP, J.—This is an action of contract brought by the members of the firm of Freeland, Loomis & Co. against the members of the firm of Ritz & Glines for the breach of an agreement, under seal and signed by the parties, to accept a lease of certain rooms in a building. The agreement declared on recited that a building was then in process of erection by the Boylston Market Association on the corner of Washington street and Boylston street, in Boston; that Freeland, Loomis & Co. had entered into an agreement with said association for a lease of said building as soon as the same should be completed; and that Ritz & Glines were desirous of obtaining from Freeland, Loomis & Co. a lease of part of said building, "to wit, rooms on the sixth floor thereof, as marked on plan of said floor in the possession of Freeland, Loomis & Co., containing about twenty-five hundred square feet, more or less, and situated in the northeasterly corner of said building, for the purpose of there conducting the photographic business." Freeland, Loomis & Co. agreed, as soon as the building should be ready for occupancy, and a lease thereof executed and delivered to them, to execute and deliver, and Ritz & Glines agreed to accept, "a lease of the rooms aforesaid, to be used solely and exclusively for the business aforesaid, for a period of five years from the date of the completion of said building, at an annual rental of twenty-five hundred dollars, payable in equal monthly installments, the lease to be in substantial accordance with the blank form hereunto annexed, and to be made subject in all respects to the terms and conditions of the said agreement and lease between said Freeland, Loomis & Co. and said Boylston Market Association."

1. The defendants contend that, inasmuch as the agreement provides that the lease is "to be made subject in all respects to the agreement and lease between" the plaintiffs and their lessor, which lease was not then in existence, there is no sufficient agreement or memorandum to satisfy the statute of frauds. Pub. St., c. 78, § 1, cl. 4. The agreement declared on is dated April 17, 1888, and it is clear that, considered alone, it is insufficient to satisfy the statute, for some of its terms were then uncertain and might never be made certain. May v. Ward, 134 Mass. 127; Ashcroft v. Butterworth, 136 Mass. 511. What was then uncertain has, however, since been made certain, as it appears by the report upon which the case comes before us, that in January, 1889, before this action was brought, a

lease, in writing, of the entire building was delivered to the plaintiffs by the lessor. It is a well-settled rule of law that, while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself or from some other paper or papers therein referred to. If one of a series of papers which appear to have relation to the same contract is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to. Atwood v. Cobb, 16 Pick. (Mass.) 227, 230; Lerned v. Wannemacher, 9 Allen (Mass.) 412; Rhoades v. Castner, 12 Allen (Mass.) 130; Beckwith v. Talbot, 95 U. S. 289; Grafton v. Cummings, 99 U. S. 100; Ryan v. U. S., 136 U. S. 68, 83; Peck v. Vandemark, 99 N. Y. 30; Varnish Co. v. Lorick (S. Car.), 8 S. E. 8; Ridgway v. Wharton, 6 H. L. Cas. 238; Fitzmaurice v. Bayley, 9 H. L. Cas. 78, 102; Baumann v. James, L. R. 3 Ch. App. 508; Chardlow v. Cotterell, 18 Ch. Div. 280, 20 Ch. Div. 90; Studds v. Watson, 28 Ch. Div. 305; Oliver v. Hunting, 44 Ch. Div. 205; Long v. Miller, 4 C. P. Div. 450; Cave v. Hastings, 7 Q. B. Div. 125.

The defendants, however, contend that these principles apply only to papers already in existence when the instrument signed by the party sought to be charged is executed; and in support of this view, rely upon the case of Wood v. Midgley, 2 Smale & G. 115, on appeal, 5 De Gex, M. & G. 41. This was a bill for specific performance of a contract of sale of land. Some of the terms had been reduced to writing, but not signed. The purchaser paid his deposit money to the auctioneer who sold the land, and he signed the following receipt:

"Memorandum.—Mr. Thomas Midgley has paid to me the sum of £50 as a deposit and in part payment of £1,000 for the purchase of the Ship and Camel public house at Dockhead, the terms to be expressed in an agreement to be signed as soon as prepared."

Vice-Chancellor Stuart overruled a demurrer to the bill on the ground that the memorandum to be prepared and signed was only the fair copy of the draft as settled and agreed to. On appeal the demurrer was sustained by Lord Justice Turner and Lord Justice Knight-Bruce on the ground that the agreement referred to, although it fixed the price, left other points to be determined. "The conditions of sale were to be adapted to a sale by private contract and were to be subject to a future agreement." The case is therefore one of an agreement incomplete when made and which never was completed. See also, Ridgway v. Wharton, *ubi supra;* Fitzmaurice v. Bayley, *ubi supra;* Rummens v. Robins, 3 De Gex, J. & S. 88. In Brown v. Bellows, 4 Pick. (Mass.) 179, the plaintiff and the defendant were owners of a water privilege, with the building thereon, etc. The plaintiff agreed to sell his interest, and the de-

fendant agreed to buy it, "at such prices as shall be agreed on and awarded by three men, one chosen by the plaintiff, one by the defendant, and the third by the two thus chosen, which award shall be final and binding on the parties." After the price had been thus determined in writing, the defendant refused to perform his agreement. The plaintiff brought an action for covenant broken, to which the defendant set up the statute of frauds, contending that the referees were not named in the agreement, and that it depended wholly upon parol evidence to determine who they were. This objection was disposed of by the court saying that the contract had been performed in this respect. The defendant further contended that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees. But this objection was overruled. The last point decided in this case, therefore, is a direct authority for the proposition that it is no objection to a written contract that some of the terms are to be fixed by something to be done in the future, if that something is done before action is brought; and that if it is in writing the provisions of the statute of frauds are complied with. We are therefore of opinion that the statute of frauds is no defense to this action. * * *

LEWIS v. WOOD.

1891. 153 Mass. 321, 26 N. E. 862.

BILL for specific performance.

MORTON, J.—Without considering all the objections that have been urged against the memorandum it is sufficient to say that it is fatally defective in not containing the name of the purchaser or any designation of him whatever. In order to satisfy the statute the memorandum should not only have been signed by the defendant or her authorized agent, and have identified the property to be sold, but should also have contained the name of the other party to the contract, or should have described him with reasonable certainty. This was not done and the memorandum is therefore insufficient. Browne, St. Frauds, § 372; 2 Benj. Sales, § 234; Champion v. Plummer, 1 Bos. & P. (N. R.) 252; Williams v. Lake, 2 El. & El. 349; Williams v. Byrnes, 1 Moore P. C. (N. S.) 154; Vanderbergh v. Spooner, L. R. 1 Exch. 316; Fessenden v. Mussey, 11 Cush. (Mass.) 127; Coddington v. Goddard, 16 Gray (Mass.) 444; Lincoln v. Preserving Co., 132 Mass. 129; Grafton v. Cummings, 99 U. S. 100; Nichols v. Johnson, 10 Conn. 192; Sherburne v. Shaw, 1 N. H. 157; McGovern v. Hern, 153 Mass. 308. The *ratio decidendi* is that the language of the statute "cannot be satisfied unless the existence of a bargain or contract appears, evidenced in writing,

and a bargain or contract can not appear unless the parties to it are specified either nominally or by description or reference." Williams v. Byrnes, *supra*.

FRAZER v. HOWE ET AL.

1883. 106 Ill. 563.

SCHOLFIELD, J.—* * * The writing, to meet the requirement of the statute, need not give all the details, but it must express the substance of the contract with reasonable certainty, either by its own terms or by reference to some other agreement or matter from which it can be ascertained with like reasonable certainty. (Atwood v. Cobb, 16 Pick. (Mass.) 227; Ives v. Hazard, 4 R. I. 29; Meadows v. Meadows, 3 McCord (S. Car.) 458.) The contract cannot rest partly in writing and partly in parol. (Seymour v. Belding, 83 Ill. 222; Weaver v. Fries, 85 *id.* 356.) The letters here fail to show an unqualified agreement between the parties, both in respect of the quantity of lime to be delivered and the price to be paid for it, which were indispensable elements in the contract. * * *

ELWELL ET AL. v. HICKS ET AL.

1909. 238 Ill. 170, 87 N. E. 316.

VICKERS, J.—Mary K. Collins filed a bill in equity to foreclose a trust deed upon lot 1, in block 4, Gage & McKey's subdivision in block 9, Wright & Webster's subdivision of the northeast quarter of section 12, township 39 north, range 13 east, in Cook county, Illinois, which was given March 21, 1894, to secure three notes of $1,100 each, due in one, two and three years and forty days, respectively, after date, with interest at six per cent per annum and to draw seven per cent after maturity. Thomas P. Hicks, Stephen P. Hicks and Frederick S. Baird were made parties defendant to the bill. Defendants answered the bill, admitting the execution of the notes and the trust deed, but alleged that on July 9, 1904, a verbal agreement was entered into with Mary K. Collins that Mrs. Collins should surrender the three $1,100 notes for $33 in cash and a quit-claim deed of the defendants conveying to her the lot in question. The defendants below filed a cross-bill, in which they set up the verbal agreement referred to in their answer and alleged that they had duly executed the quit-claim deed and tendered the same, together with $33 in cash, to Mrs. Collins, and prayed that such verbal agreement might be decreed to be specifically performed. After the filing of

the bill and before the cause came on for hearing, Mary K. Collins died, and her administratrix was substituted as a party complainant. The cause was referred to a master in chancery, who, after hearing the evidence, found for complainant in the original bill and found the amount due to be $3,965.20, and recommended a decree in favor of complainant in the original bill and a decree dismissing the cross-bill for want of equity. This report was confirmed by the trial court and decree was entered in accordance therewith. Upon an appeal to the appellate court for the First district, the decree of the circuit court was affirmed. Defendants in the original bill and complainants in the cross-bill below have prosecuted a further appeal to this court.

The evidence introduced before the master showed *prima facie* that appellees were entitled to a decree on the original bill. The only questions, therefore, involved on this appeal relate to appellants' rights under their cross-bill.

The evidence shows that Mary K. Collins was originally the owner of the premises involved, and that on March 21, 1894, she sold and conveyed the premises to appellant Thomas P. Hicks for $1,800 in cash and three notes of $1,100 each, which were secured by the trust deed the foreclosure of which is involved in this proceeding. On the same day that Mary K. Collins conveyed the premises to Thomas P. Hicks, he conveyed one-third interest each to Stephen P. Hicks and Frederick S. Baird, appellants, each becoming the owner of an undivided one-third of the premises subject to the trust deed, which each assumed and agreed to pay as part of the purchase money of the premises. An abstract of title was made out and left in the office of Frederick S. Baird, who is an attorney at law, until July 20, 1903, when he delivered the abstract of title to Mrs. Collins. At the time the abstract of title was delivered, Frederick S. Baird prepared and Mrs. Collins executed the following receipt:

"July 20, 1903.

"Received of F. S. Baird abstract L. 1, Blk. 4, Gage & McKey's subdiv. Blk. 9, Wright & Webster's subdiv. of N. E. ¼ 12, 39, 13, from government to June 30, 1892, on exchange notes for deed.

"Mrs. May K. Collins."

In the answer to appellant's cross-bill § 2 of the statute of frauds, is set up and relied on as a defense to the specific performance of the alleged agreement relied on in the cross-bill. Appellants contend that the foregoing receipt is a sufficient written memorandum of the contract to meet the requirements of § 2 of the statute of frauds, and their assignment of error on the refusal of the court below to so hold is mainly insisted on here as a reason for a reversal.

We can not agree with the view insisted upon by the appellants that this receipt is such a memorandum or note in writing of the alleged contract as the statute requires. While it is true that parol evidence may, under our statute, be received to show what the con-

sideration for the contract is, and also for the purpose of proving an acceptance against the party who signed it and for identifying the party and property where the contract is ambiguous, yet the contract itself can not rest partly in writing and partly in parol, but the writings must contain the names of the parties, the terms, price and description of the property, either by recital on their face or by reference to other writings wherein such facts are stated. (Browne on Statute of Frauds (2d Ed.), § 372, *et seq.;* McConnell v. Brillhart, 17 Ill. 354; Cloud v. Greasley, 125 *id.* 313; Farwell v. Lowther, 18 *id.* 252; Wright v. Raftree, 181 *id.* 464.) The writing in question falls short of the requirements of the statute as the same has been construed in the foregoing decisions of this court. The writing relied on is a receipt, not for a part of the purchase money, followed by other particulars showing that the contract had, in fact, been made, as was the case with the receipt before this court in Ullsperger v. Meyer, 217 Ill. 262, but for an abstract to certain property therein described. The words "on exchange notes for deed," which appear immediately before the signature of Mary K. Collins, cannot be construed as sufficient evidence that Mary K. Collins had contracted to surrender three promissory notes for $1,100 each in exchange for $33 in cash and a deed from appellants for the premises in question, which, in brief, is the contract set up in appellants' cross-bill. The words "on exchange notes for deed" are uncertain and ambiguous, requiring parol evidence not only identifying the parties, but to determine the relation of the parties to the transaction. No one could determine from these words whether Mary K. Collins was to receive from some other undisclosed party a deed for notes or notes for a deed. In other words, it can not be determined without the aid of extrinsic evidence whether Mary K. Collins was the seller or the buyer. Neither can any one decide whether the notes are the notes in question or other notes to be executed by Mary K. Collins if she was the buyer, or by some other person to whom she was selling. Again, the premises are not identified in connection with the "deed" to be given. The receipt correctly describes the premises as in the trust deed, but this description shows merely what the abstract of title covers, but it can not be said that the deed which was to be given in exchange for notes was a deed for these premises. The writing relied on does not contain, by express words or fair intendment, the essential requirements of the statute. * * *

Judgment affirmed.

QUINN v. CHAMPAGNE.

1888. 38 Minn. 322, 37 N. W. 451.

DICKINSON, J.—This action is to compel a specific performance of an alleged contract for the sale of the northwest ¼ of section 1, township 49 N., range 15 W., in the county of St. Louis, in this state. The principal question presented upon this appeal relates to the sufficiency of the written memorandum of the contract as respects the description of the property. This intrument is as follows:

"Duluth, Minn., December 20, 1886.

"Received of John J. Quinn one hundred dollars, being part purchase price of the N. W. ¼ of section 1, tp. 49, range 15. Price of same, $5,000 cash, according to terms of refusal. Said owner to satisfy mortgage to John Gunty in full, and in cash, and give clear warranty deed in five days if possible.

"Peter B. Champagne,
"Per C. H. Foster, Agent."

This instrument appears, upon its face, to have been made in this state, and it was admitted in the pleadings that the defendant, who resides here, owned the land in controversy. The court, deeming the description in the memorandum to be insufficient under the statute of frauds, decided the cause in favor of the defendant.

We are of the opinion that the memorandum, read in the light of the facts shown, and of facts of which we will take judicial notice, was sufficient. It will be seen that the writing, upon its face, designates the defendant as the owner of the property referred to (for the words "said owner" evidently refer to him, the party agreeing to sell, and not to the party purchasing), so that the legal effect is as though the property had been described as the N. W. ¼ of section 1, township 49, range 15, owned by me." Hurley v. Brown, 98 Mass. 545; Scanlon v. Geddes, 112 Mass. 15. We should take judicial notice of the general system of governmental surveys in accordance with which the lands in this state have been surveyed and almost universally described in legislation and in conveyances. Atwater v. Schenck, 9 Wis. 160. We therefore take notice of the fact that there is and can be but one township 49, range 15, in this state, that being west of the fourth P. M. Thus the description in the memorandum is applicable to and designates the land in controversy, unless the fact that the terms of description (excepting that of the defendant's ownership) may be equally applicable to lands in other states, makes it so ambiguous and uncertain that it is insufficient under the statute. We think that the facts that the written agreement was made in this state by a resident thereof, designating the premises by a description which is strictly applicable to a particular tract of land (and to no other) in this state, and that the party executing the memorandum of the agreement to sell was the owner of

that tract, are sufficient to identify the land described in the memorandum as the land in controversy, although the description is wanting in express reference to the county or state where the land is situated. Atwater v. Schenck, *supra;* Russell v. Sweezey, 22 Mich. 235; Beal v. Blair, 33 Iowa 318; Butler v. Davis, 5 Neb. 521; Harding v. Strong, 42 Ill. 148; Hurley v. Brown, 98 Mass. 545. See, also, Clark v. Powers, 45 Ill. 283, and cases cited. Such facts as those to which we have referred may be shown and considered for the purpose of identifying the subject-matter of the memorandum, or agreement, as it is therein described; and the memorandum is sufficient if, when read in the light of such circumstances, the subject-matter is therein clearly designated. Authorities above cited; also Romans v. Langerin, 34 Minn. 312, 25 N. W. 638; Mead v. Parker, 115 Mass. 413; Pom. Cont. 152. Although there may be lands in other states to which the terms "township 49, range 15," would be applicable for description, it is not to be presumed that this defendant was the owner of such land; and in the absence of such a presumption or of proof this is not a case of a potent ambiguity in the memorandum before us.

Judgment reversed, with directions to enter judgment for the plaintiff.

GUTHRIE v. ANDERSON.

1892. 49 Kan. 416, 30 Pac. 459.

On motion for rehearing.

Per Curiam.—It was stated in the original opinion handed down "that where an action is brought upon a writing or memorandum for or concerning the sale of land, if the party sought to be charged signed the same by himself or agent, he is liable, and cannot successfully plead that the plaintiff has not signed." Under the statute of frauds, the only signature required is that of the party against whom the contract is to be enforced. The contract is good or not, at the election of the party who has not signed. In this case it is conceded that Nicholas Anderson and Sophia, his wife, signed the written memorandum. By the effect of the decisions the contract could have been enforced against them at the election of W. W. Guthrie, the party who did not sign. The contention upon the motion for a rehearing is that Guthrie signed because his name appears in the body of the memorandum. We see no good reason to change the views heretofore expressed by this court. The authorities are not uniform as to how far the writing by the party of his name must be with the intention of signing. There is some conflict of authority on the question. If the memorandum signed by Anderson and wife had recited that "I, W. W. Guthrie, agree with N. Anderson, or N. An-

derson and wife," etc., under some of the authorities the name or signature thus inserted would be considered as signing within the statute. 1 Benj. Sales, § 262. It is not necessary that the signature of a party to a memorandum, under the statute requiring a signing, should be at the bottom or end of the memorandum, but it may be at the top, in the middle, or inserted in any other part of the paper. But in all cases the name of the party to be charged must be affixed in such a manner as to authenticate the instrument. The signature may be by mark, initials, pencil, typewriting, print or stamp, if the party to be charged intended by the mark, initials, pencil, print or stamp to affix the same as his signature, with the purpose to complete or authenticate the contract as his own contract, and to indicate his intention to be bound thereby. In this case the memorandum, signed by Anderson and wife, recited: "The undersigned, husband and wife, owners," etc., * * * sell the same to W. W. Guthrie, * * * and * * * to execute and deliver deed * * * to W. W. Guthrie." It was nowhere recited in the memorandum that "W. W. Guthrie has agreed" or "proposes," etc. In fact, there is no agreement anywhere in the memorandum on the part of W. W. Guthrie to do anything. In support of the motion for a rehearing the most important cases referred to are Wise v. Ray, 3 G. Greene (N. J.) 430; Penniman v. Hartshorn, 13 Mass. 87; and Clason v. Bailey, 14 Johns. Ch. (N. Y.) 486. In the Wise-Ray case the written contract was signed by James Wise. In that case Ray brought his action against Wise, who had signed the contract. He properly recovered his damages for a breach thereof. In the Penniman-Hartshorn case, Silas Penniman wrote the body of the contract or memorandum and signed the same at the bottom thereof. Hartshorn in his own handwriting on the top of the contract or memorandum signed "Hartshorn & Arnold, of Providence." The writing of Hartshorn, under the circumstances, was a signing, and evidently was intended to be the signatures of Hartshorn and Arnold, the parties charged. In the Clason-Bailey case, Clason, through his agent, Townsend, purchased of Bailey & Voorhees 3,000 bushels of rye at a dollar a bushel, payable on delivery. Thereupon a written memorandum was made by Townsend, the authorized agent of Clason, which, after giving date, read: "Bought for Isaac Clason, of Bailey & Voorhees, 3,000 bushels of good merchantable rye," etc. Subsequently Clason refused to receive and pay for the rye, and Bailey and Voorhees brought their action against him to recover damages. The court, in its opinion, said: "It is admitted that Clason signed this contract by the insertion of his name by his authorized agent." Of course, under such an admission, Clason, the party charged, was liable upon the memorandum. Other cases are referred to which are claimed to be contrary to the opinion handed down, but after a critical examination of them we do not think that any are exactly similar to the case decided. The memorandum in

this case seems to have been expressly written so as not to need the signature of Guthrie, and so that he could not be charged thereon. The motion for a rehearing will be overruled.

Where the statute has the word "subscribed" instead of "signed" the signature must be substantially (a) at the end of the memorandum (b).

(a) Coon v. Rigden, 4 Colo. 275, 282; Cal. Canneries Co. v. Scatena, 117 Cal. 447, 49 Pac. 462.

(b) James v. Patten, 6 N. Y. 9; Coe v. Tough, 116 N. Y. 277, 22 N. E. 550.

But under statutes requiring the memorandum of a contract for the sale of land to be subscribed only by the party by whom the sale is to be made, it is held that such a contract, when signed by the vendor, is enforceable against either party.

Tripp v. Bishop, 56 Pa. St. 424, 428; Broadhead v. Reinbold, 200 Pa. 618, 622-3, 50 Atl. 229; Lowber v. Connit, 36 Wis. 176, 182; Docter v. Hellberg, 65 Wis. 415, 421, 27 N. W. 176; Wall v. Ry. Co., 86 Wis. 48, 56, 56 N. W. 367; Ide v. Leiser, 10 Mont. 5, 10, 24 Pac. 695; Mull v. Smith, 132 Mich. 618, 620, 94 N. W. 183.

BENT ET AL. V. COBB ET AL.

1857. 9 Gray (Mass.) 397.

ACTION of contract by guardians on a sale by auction of land of their ward pursuant to a license of the judge of probate. (One of the guardians was the auctioneer.) Answer, the statute of frauds. Verdict for plaintiffs. Exceptions.

BIGELOW, J.—The memorandum of the contract on which the plaintiff relies to take the case out of the operation of the statute of frauds is in our judgment insufficient because it is not signed by the defendant, or by "any person thereunto by him lawfully authorized." In all cases of sales by auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum of a contract or agreement is binding on both. He is the agent of the vendor by virtue of his employment to make the sale, and he is made the agent of the vendee by the act of the latter in giving him his bid and receiving from him without objection the announcement that the property sold is knocked off to him as purchaser. But this rule is not applicable to cases where the auctioneer is also himself the vendor. The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which would absolutely bind the other. If such were its

true construction it would be a feeble security against fraud, or, rather, it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract binding on the purchaser he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale. The publicity of a sale by auction would be no safeguard against a false statement of the terms of sale, made in the written memorandum signed by a party acting in the double capacity of auctioneer and vendor. The chief reason in support of the rule, that an auctioneer, acting solely as such, may be the agent of both parties to bind them by his memorandum, is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract and the party in interest also. The purpose of the statute was, that a contract should not be binding unless it was in writing and signed by the party himself to be charged thereby, or by some third person, in his behalf, not a party to the contract, who might impartially note its contents.

Nor can it make any difference as to the power of the vendor to make a memorandum binding on the vendee, that the sale is made by the former in a representative or fiduciary character as an executor, administrator, guardian or trustee. He is still the party to the contract, the price is to be paid to him, he is to deal with the purchase money; his interest and bias would naturally be in favor of those whom he represented, and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to those of the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties. We do not mean to say that a contract would not be binding, made by an auctioneer, where, from the form in which it was written, an action might be brought to enforce the contract in his name. In such case, if he was only the nominal party to the contract and the record, not being himself the vendor, and having no interest in the sale except as auctioneer, his memorandum might be sufficient to bind both parties to the contract. But we confine our opinion to the case at bar, where the auctioneer was the vendor and a party having an interest, greater or less, in the contract, as well as a party to it in terms. Wright v. Dannah, 2 Campb. 203; Farebrother v. Simmons, 5 B. & Ald. 333; Rayner v. Linthorne, 2 Car. & P. 124; Bird v. Boulter, 4 B. & Ald. 443, and 1 Nev. & Man. 313; Smith v. Arnold, 5 Mason 417.

Exceptions sustained.

FORD v. WILLIAMS.

1858. 21 How. (U. S.) 287.

GRIER, J.—The single question presented for our decision in this case is, whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. "Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal." See Higgins v. Senior, 8 Mees. & Wels. 843.

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the states, but by this court. See New Jersey Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 381, *et cas. ib. cit.*

MORTON v. MURRAY ET AL.

1898. 176 Ill. 54, 51 N. E. 767.

BILL for specific performance. Defendants set up and pleaded the statute of frauds. Bill dismissed. Appeal.

CARTER, C. J.— * * * The only question upon which any doubt can arise is whether or not the statute of frauds must operate to pre-

vent the specific performance of the contract. The second section of the statute provides that "no action shall be brought to charge any person upon any contract for the sale of lands * * * unless such contract, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." It is insisted by counsel for appellees that in writing the letter and signing Murray's name Mrs. Murray acted as the agent of Murray, and it not appearing that she had any authority in writing signed by Murray, the statute applies and the suit cannot be maintained—citing Bissell v. Terry, 69 Ill. 184; Albertson v. Ashton, 102 id. 50, and Edward v. Tyler, 141 id. 454. These cases do not reach the question as presented by this record. It is not pretended that Mrs. Murray had any written authority from Murray to write the letter or to sign his name to it, but it is contended that the letter was the letter of Murray himself—that it was written in his presence, by his dictation and in his name—and we are of the opinion that this view is fully sustained by the evidence. It is true, as contended by counsel for appellees, that there is no direct evidence that Murray stood by and dictated the letter, or directed his wife to sign his name to it when it was written; but such a fact may be proved by indirect as well as by direct evidence, and we think this fact was sufficiently shown by the circumstances, and Murrey's statements and admissions proved on the hearing. It was shown that he rarely did any writing, but that his wife was in the habit of doing his writing for him. He spoke of writing to Morton about the matter before the letter was written, and afterwards repeatedly spoke of having written to Morton about conveying the land to him, and it is not pretended that he wrote or had written more than one letter on this subject. The evidence was clear that he knew of the letter and its contents and regarded it as his own, and that he expressed his intention of complying with its terms. The testimony tended to prove that he mailed the letter himself. This proof had a further effect than to show a mere parol ratification; it tended to prove that the act was his own. If it had been proved that after the letter was written he stated to others that his wife had written and signed his name to it in his presence and by his direction, it would not be denied that such proof would have been competent to prove that the instrument was his own individual act and not that of an agent. So, too, then, was it proper to prove the same fact indirectly, and there was practically no evidence to the contrary.

Considering the letter, also, in connection with the circumstances and Murray's admissions proved, it contains some inherent evidence of the fact contended for by appellant. After the first few lines from Mrs. Murray the language changes, as if coming directly from Murray in the first person, and in substance says: "As I have always promised to give you a farm, I have bought the Billy O. Ste-

vens farm and the Dan Clark forty for you. I want you to get a wife, and come home and tend it, and give me two-fifths as long as I live, then to Lisey (Meaning his, Murray's, wife) as long as she lives, and at our death the land shall be yours. I will make you a deed to it. I think this will pay you for all the work you have done for me. I will tile it out, and help you to fix up the house and barn, and as much other improving as I see fit to do," etc. It was then signed, "from X J. F. Murray, by Mrs. John Murray." From an inspection of the original letter it would seem that the cross preceding Murray's name was placed there after the name was written, and while there was no direct evidence that he made this cross it was proved that he sometimes signed papers in that way.

Without considering whether or not, under the facts of this case, a parol ratification of the act of Mrs. Murray, as Murray's agent, in writing the letter, acted upon in part by both parties, would be sufficient to take the case out of the statute, we are satisfied that from the proof it should have been found that the instrument or letter was that of Murray himself, and that no authority in writing to Mrs. Murray, signed by him, was necessary. One may write and execute an instrument by the hand of another when done in his presence and by his direction, and the fact may be proved by parol evidence, and an action may be brought upon the instrument without violating the statute of frauds. See 1 Am. & Eng. Ency. of Law (2d ed.) 956, and cases there cited; Meyer v. King, 29 La. Ann. 567; Rockford, Rock Island & St. Louis Railroad Co. v. Shunick, 65 Ill. 223; Ball v. Dunsterville, 4 T. R. 313; Freeman v. Lose, 14 Ohio St. 154; Gardner v. Gardner, 5 Cush. (Mass.) 483; Videau v. Griffin, 21 Cal. 392; Bartlett v. Drake, 100 Mass. 175. We see no reason why the fact of execution cannot be proved by parol evidence of the statements of the party to be charged and of facts and circumstances tending to prove the principal fact, as in other cases. Treating the letter as a contract in writing to convey the land, as it was, the statute of frauds was not a defense to the case established by the evidence.

Finding the decree to be against the evidence it is accordingly reversed and the cause is remanded to the circuit court, with directions to enter a decree for the specific performance of the contract as prayed in the bill.

Reversed and remanded.

Mr. Justice Magruder, dissenting.

In Eggleston v. Wagner, 46 Mich. 618, 10 N. W. 41, the court say: "It is true that the mechanical act of signing was the act of another; but it is equally true that it was the immediate dictate of the will of Eggleston and was performed under his actual personal supervision. The penman was as much his instrument in respect to the fact of signing as the pen itself would have been had he actually held it. The signature was substantially his own."

§ 27.—Promise by Executor or Administrator to Answer Damages Out of His Own Estate.

BELLOWS v. SOWLES.

1884. 57 Vt. 164.

IN this case the defendant, executor and legatee, in consideration that the plaintiff, heir at law, would not contest the will of Hiram Bellows, agreed to pay the plaintiff $5,000.

POWERS, J.—Counsel for the defendant demurred to the declaration in this case upon two grounds. First, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within and is therefore not enforceable under the statute of frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the statute of frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities or discuss the principle. As to the second point urged in behalf of the defendant this case presents greater difficulties. Although the statute of frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls reads: "No action at law or in equity shall be brought * * * upon a special promise of an executor or administrator to answer damages out of his own estate."

This special promise referred to is, in short, any actual promise made by an executor or administrator in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer damages out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the testator's estate for which the executor promises to pay damages out of his own estate. The statute, then, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default or misdoings of another." And so Judge Royce,

in delivering the opinion of the court in Harrington v. Rich, 6 Vt. 666, declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute; that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a guaranty, and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds, p. 150, says: "In the fourth section of the statute of frauds special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so, on page 184, he interprets "to answer damages" as equivalent to pay debts of the decedent. This seems to be the construction given to the statute by Chief Justice Redfield in his work on Wills, vol. 11, p. 290, *et seq.*

The Revised Statutes of New York, vol. 11, p. 113, have improved upon the phraseology of the old statute as we have adopted it by adding, or to pay the debts of the testator or intestate out of his own estate.

If we are correct in this view of the relation between these two clauses the solution of the question presented by this case is comparatively easy.

It has been held in this state that when the contract is founded upon a new and distinct consideration moving between the parties the undertaking is original and independent and not within the statute. Templeton v. Bascom, 33 Vt. 132; Cross v. Richardson, 30 Vt. 641; Lampson v. Hobart, 28 Vt. 697. Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority that where the principal or immediate object of the promisor is not to pay the debt of another, but to subserve some purpose of his own, the promise is original and independent and not within the statute. Brandt Sur. 72; 3 Par. Cont. 24; Rob. Fr. 232; Emerson v. Slater, 22 How. (U. S.) 28. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

Pierpont, J., in delivering the opinion of the court in Cross v. Richardson, supra, says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor and places him under a pecuniary obligation to the promisee entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant.

The consideration did not effect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the executor of that estate whether it was to be divided according to the will or by the law of descent. If the subject-matter of this contract had been something entirely foreign to this estate no one would maintain that the defendant was not bound by it because he happened to be named executor in this will. Here the subject-matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists, therefore, in this case no sufficient, actual, primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument for fraud. As in this case, the plaintiff would be deprived of his legal right to contest the will by a party who has reaped all the benefit of the transaction and is shielded from responsibility by a technicality. We do not believe this was the result contemplated by the statute.

The judgment of the county court overruling the demurrer and adjudging the declaration sufficient is affirmed and case remanded with leave to the defendant to replead on the usual terms.

OKESON'S APPEAL.

1868. 59 Pa. St. 99.

SHARSWOOD, J.—* * * The cases appear to hold that on a promise by an executor or administrator to pay a legacy or distributive share in consideration of assets, the consideration and promise must be co-extensive. Rann v. Hughes, 7 T. R. 350, note; Butt v. Humphrey, 22 Conn. 317. However that may be, it is clear that the executor cannot be made liable *de bonis propriis* on an oral promise on the mere consideration of assets. That would be "to charge him upon a promise to answer damages out of his own estate," and therefore within the act of April 26, 1855, Pamph. L. 308. It has been accordingly held in Hay v. Green, 12 Cush. (Mass.) 282, that a verbal promise by an administrator to pay a distributive share in the estate of the decedent was within the statute of frauds, though there were assets; and in Philpot v. Briant, 4 Bingh. 717, a promise by the executor of an acceptor of a bill of exchange to pay out of his own

estate in consideration of forbearance is held to be void if not in writing.

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§ 28.—Promise to Answer for the Debt, Default or Miscarriage of Another.

EDDY ET AL. v. ROBERTS.

1856. 17 Ill. 505.

SKINNER, J.—* * * The third count of the declaration alleges that Williams was indebted to plaintiffs; that defendant, having hands at work for him, in consideration that plaintiffs would advance to them on defendant's account goods out of plaintiffs' store, promised to pay for the goods, and also to pay plaintiffs the debt of Williams, and that plaintiffs did advance the goods, etc.

The defendant pleaded the general issue and the statute of frauds. * * *

The third count is substantially proved, and the question is, is the verbal promise of defendant therein stated to pay the debt of Williams binding on him in law?

The statute of frauds and perjuries declares "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the promise or agreement, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." This is substantially like the English statute upon the same subject, and similar provisions exist, it is believed, in all of the United States. The plain object of the statute is to require higher and more certain evidence to charge a party where he does not receive the substantial benefit of the transaction and where another is primarily liable to pay the debt or discharge the duty, and thereby to afford greater security against the setting up of fraudulent demands where the party sought to be charged is another than the real debtor and whose debt or duty on performance of the alleged contract by such third person would be discharged. The decisions on this branch of the statute, both in England and the United States are numerous and, to a considerable extent, apparently contradictory, insomuch that any attempt to review and reconcile them would be a hopeless undertaking. It cannot be denied that courts in many instances to prevent the successful interposition of the statute against apparently meritorious claims, and in the particular case to avoid a seeming wrong, have departed from the plain letter and spirit of the statute. Hard cases are said to make bad precedents, and, in our judgment, it is not only better in the general operation, but the imperative duty

of the courts to hold, in all cases, to the statute as it reads, avoiding all nice, complicated or shadowy distinctions. By such a course the law is rendered more certain and uniform in its administration, and principles, instead of mere cases, become the foundation of judicial decisions. The main question for inquiry under the statute is, whether the promise is an original and independent one, or whether it is subsidiary, collateral to, and dependent upon, the debt or liability of another?

If another is primary, or principal debtor, and the relations of debtor and creditor remain unchanged, both as to the right and the remedy, and no trust is created by the transaction out of which the promise arises, such promise is in its nature collateral and not original. If the debt be paid, or duty performed, by him who is primarily liable, the incident, or collateral promise, is of no force for any purpose; there is nothing remaining upon which it can operate. Tested by these rules the contract alleged in the third count is void if not in writing. The debt of Williams continued liable to the same extent as if the promise had not been made; the relations of debtor and creditor were in no manner changed; no remedy, pledge or security was relinquished, and no trust devolved upon the defendant to execute by reason of the transaction. Shapin v. Lapham, 20 Pick. (Mass.) 467; Russell v. Bulk, 11 Vt. 166; Tileston v. Nettleton, 6 Pick. (Mass.) 509; Nelson v. Boynton, 3 Met. (Mass.) 396; Cahill v. Bigelow, 18 Pick. (Mass.) 369; Stone v. Symmes, *ibid.* 467; Durham v. Anledge, 1 Strob. (S. Car.) 5; Carville v. Crane, 5 Hill (N. Y.) 483; Jackson v. Rayner, 12 John. (N. Y.) 291; Simpson v. Patton, 4 John. (N. Y.) 422; Barker v. Bucklin, 2 Denio (N. Y.) 45; Loomis v. Newhall, 15 Pick. (Mass.) 159.

It is urged that the promise is founded upon a new and independent consideration, moving from the promisee to the promisor, and, therefore, an original undertaking. We may admit that there is a sufficient consideration appearing in the count and proof, and that, aside from the statute, the promise would be obligatory; but the statute steps in and makes the promise void if not in writing. A consideration is necessary to support all promises, for without such consideration no action can be maintained upon them, whether in writing or not.

Some promises, as in cases of commercial paper, import a consideration. So do sealed instruments; and in such case to maintain an action no extrinsic evidence of a consideration is required. Had the defendant promised, in writing, to pay Williams' debt without a consideration therefor, valid in law this would have been a naked promise which could not be enforced.

The statute does not change the common law in this respect, but adds the requisition that the promise be in writing. Where the principal and the collateral contracts are made at the same time, the credit given, or consideration passing between the principal parties,

may be sufficient to sustain the collateral promise, but such promise must be in writing. Where the collateral promise is subsequent to the creation of the principal contract or debt, the collateral promise must not only be founded on a new consideration, but be in writing. In some cases it is said that the promise is an original one and, therefore, not within the statute where the promise arises out of some new and independent consideration moving between the newly contracting parties. This general language seems to me to overlook an essential requisite to a valid promise or contract—a consideration—and to strip the statute of that protection it was intended to afford in the prevention of wrong to third persons by the setting up of fictitious contracts and maintaining them by perjury. A close examination, however, of the cases where similar language occurs will disclose that many, if not most of them, were where the creditor had a subsisting lien, or security for the debt, which was given up for the benefit of the defendant; where the creditor discharged the original debt; where by some transaction with the debtor a trust was created, to be executed by the defendant, in favor of the plaintiff; or where the promise was made *to* the debtor for the payment of his debt to the plaintiff. The substance of the contract alleged in the third count is this: for an uncertain credit at the store of plaintiffs the defendant guaranteed the debt of Williams, or promised to pay it in a reasonable time if Williams did not, and no fair construction can take it out of the statute. * * *

COLE v. HUTCHINSON.

1886. 34 Minn. 410, 26 N. W. 319.

GILFILLAN, C. J.—Action for goods sold and delivered. The goods were selected by, and delivered to, James D. Hutchinson, for his use, and the prices for them agreed upon by him and plaintiff. The defendant had no part in it, nor connection with it, unless by virtue of an alleged promise by him to plaintiff's firm, made some time before when James D. was not present, to pay for such goods as the latter should take. From the evidence as to this promise plaintiff claims that it was an order for goods to be delivered to James D., and that the sale, when made by delivery of the goods, was to defendant, and that the debt thus accruing was his debt as purchaser. On the other hand, defendant claims that, at most, it proves only a promise to answer for any debt that James D. might incur in the purchase of the goods, and that it is therefore within the statute of frauds and, not being in writing, is void. The evidence of the conversation in which the promise was made was such that the jury might have found the promise as claimed by either party,

and the verdict could not have been disturbed. The court below instructed the jury, in substance and effect, that to bring a promise within the statute of frauds as one to answer for the debt of another there must be in existence at the time when the promise is made an original liability upon which the collateral promise is founded. The court may have so stated the law through inadvertance, but it must, nevertheless, have set the jury astray.

The majority of the cases arising under this part of the statute of frauds, and upon which elaborate discussion has been had, have been cases where there was no debt or liability in existence when the promise was made. To show how far wrong such a statement of the law is we need go no further than to suppose the promise in this case to have been: "You sell to James D. whatever goods he wants, and if he does not pay for them I will." The terms of such a promise would not contemplate a sale to defendant, nor upon his credit as purchaser and principal debtor, but only a sale to James D., he becoming primarily liable for the price, and the defendant to be liable only in the event of his failure to pay. None could doubt that such a promise would be collateral and within the statute of frauds. For the error in this instruction there must be a new trial.

In view of such new trial we deem it proper to consider a feature of the case not yet alluded to: that is the fact indicated, if not established, by the evidence that when James D. got the goods he gave his promissory notes for the price. This would not only have justified the jury in finding that the credit was given to James D. (so as to make defendant's promise collateral), but certainly in the absence of adequate explanation (and the evidence does not suggest any) it would be conclusive upon the point although the promise were as such as to authorize a delivery of the goods to James D. on the credit of defendant as purchaser; yet if that was not done—if they were in fact sold and delivered to James D. and credit given to him as purchaser—then the original debt for them is his debt and the case is within the statute.

In Cahill v. Bigelow, 18 Pick. (Mass.) 369, Chief Justice Shaw states as the test whether the promise is collateral when it is made before the credit is given: "Was credit given to the person receiving the goods? If it was, then such promisor is a guarantor only, undertaking to pay another's debt. If no credit is given to the person receiving the goods, then the promisor is himself debtor for goods sold to him and delivered to another person by his order." 3 Kent, Comm. 123, states it: "If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral and must be in writing."

This, as the general rule, is followed by a practically unbroken line of decisions. From the mass of them we cite only a few: Brown v. Bradshaw, 1 Duer. (N. Y.) 199; Cowdin v. Gottgetreu, 55 N. Y. 650; Post v. Geoghegan, 5 Daly (N. Y.) 217; Swift v. Pierce, 13

Allen (Mass.) 136; Bugbee v. Kendricken, 130 Mass. 438; Walker v. Richards, 39 N. H. 259; Welch v. Marvin, 36 Mich. 59; Boykin v. Dohlonde, 37 Ala. 577; Billingsley v. Demperwolf, 11 Ind. 416; Elder v. Warfield, 7 Har. & J. (Md) 391; Wyman v. Gray, *id.* 415.

The credit mentioned in stating the rule must be understood credit, as purchaser of the goods for the receiver of the goods might by express terms assume the liability of a guarantor. He might undertake to pay in case the other did not. But where both are liable, whichever is original, primary debtor, the promise of the other must of necessity be collateral. If the debt be a debt of the receiver of the goods, then the promise of the other is to answer for his debt, and is within the statute. Upon whose credit as purchaser the goods are sold will usually be determined by what takes place when they are called for and delivered—by what takes place between the parties to the transaction—not by any mental reservation nor secret motive on the part of either. In this case the giving and taking of the notes appears to have been a part of the transaction, both parties concurring in it. It is different from charging the price against the receiver in the seller's books, or demanding pay from him, or suing him for it, for that is the act of one of the parties after the fact and is evidence, like an admission by him, and it may be shown to have been due to a misapprehension.

Order reversed..

REID v. WILSON ET AL.

1899. 109 Ga. 424, 34 S. E. 608.

FISH, J.—* * * Both members of the firm of Wilson Bros. were partners in the firm of Wilson, Pryor & Co. at the time of its dissolution, and at the time the indebtedness to the plaintiff was contracted, and were therefore liable for this debt without any new agreement to pay it. The debt of a partnership is the debt of each of its members, and a new promise by one or more of the partners, made after the dissolution of the firm, to pay a partnership debt, is not, within the meaning of the statute of frauds, a promise to pay the debt of another. Wilson v. Dozier, 58 Ga. 602; Weatherly v. Hardman, 68 Ga. 592. * * *

HOME NAT. BANK v. WATERMAN.

1890. 134 Ill. 461, 29 N. E. 503.

BAKER, J.— * * * In Hansen v. Donkersley, 37 Mich 134, it was said: "A corporation is, in law, a different person from any of its members. A promise by a stockholder to pay a corporation debt is in every sense a promise to pay the debt of another." (See, also, Browne on the Statute of Frauds, § 164.) * * *

In order to bring a promise within the statute,

1. There must be at some time a liability of a third person to be answered for.

2. The liability of the third person must be a continuing liability;

3. The transaction must not show that the liability of the third person is to be answered for out of his own property;

4. The promise must be made to the person to whom the third person is or is to become liable; and

5. The promise must not be merely incidental to a transaction where the main object of the promisor is to subserve some interest of his own.

LUSK ET AL. v. THROOP ET AL.

1901. 189 Ill. 127, 59 N. E. 529.

MAGRUDER, J.— * * * Appellants claim that if they made any promise to pay for the goods which appellees might deliver to Carlson & Olson, such promise was verbal merely, and not in writing, and was, therefore, void under the statute of frauds. Undoubtedly under the statute of frauds the promise to pay the debt of another after the same is incurred is void, unless made upon a consideration and reduced to writing. (Durant v. Rogers, 71 Ill. 121; Denton v. Jackson, 106 *id.* 433; Laidlou v. Hatch, 75 *id.* 11; Eddy v. Roberts, 17 *id.* 505; Everett v. Morrison, Breese 79.) But where goods, money or services are furnished to a third person, at the request and upon the credit of the promisor, the undertaking is clearly original, and in such case the statute of frauds does not apply. (Geary v. O'Neil, 73 Ill. 593; Hughes v. Atkins, 41 *id.* 213; Williams v. Corbet 28 *id.* 262; Blank v. Dreher, 25 *id.* 331; Owen v. Stephens, 78 *id.* 462; Hartley Bros. v. Varner, 88 *id.* 561; Schoenfield v. Brown, 78 *id.* 487; 1 Reed on Statute of Frauds, §§ 84, 86; 3 Parsons on Contracts (8th ed.), marg. p. 21; Bishop on Contracts, § 1260; Resseter v. Waterman, 151 Ill. 169.) In Resseter v. Waterman, *supra,* we said: "It may be said to be the settled rule that

where the agreement is original and independent it is not within the statute; if collateral it is." The rule is thus stated by Browne in his work on the Statute of Frauds (4th ed., § 195): "If, for instance, goods are sold upon the sole credit and responsibility of the defendant, though delivered to a third person, there is no liability to which that of the defendant can be collateral and, consequently, it does not require a memorandum in writing." The statute of frauds says that a promise to pay the debt of another must be in writing. Hence, when the promise is made there must be an existing debt. If, for example, appellees had already delivered the supplies to Carlson & Olson, and, after such delivery, appellants had promised to pay for the same, then the promise would be to pay an existing debt due from a third person and, hence, would come within the meaning of the statute. But where the defendant promises the plaintiff to pay for goods which the plaintiff may thereafter deliver to a third person, and which, at the time of the promise, have not been delivered, no debt exists from such third person to the plaintiff and, hence, the promise of the defendant to pay is an original undertaking and not merely a promise to pay the debt of another. (Williams v. Corbet, *supra.*) * * *

HARDMAN v. BRADLEY.

1877. 85 Ill. 162.

BREESE, J.—This was assumpsit, in the county court of Morgan county, by George W. Bradley, plaintiff, and against Josephus Hardman, defendant, to recover for medical services rendered by the plaintiff to one John De Laney, at the special instance and request of the defendant as alleged. There was a trial in the county court, resulting in a verdict for the plaintiff and judgment thereon, to reverse which, the defendant appealed to the circuit court on a bill of exceptions, and in that court the judgment was affirmed, and the defendant appeals to this court. There was, besides other pleas, the plea of statute of frauds and perjuries; that it was the debt of another and no promise in writing by defendant to pay.

To this plea there were two replications: First, that the promise was made before the services were rendered; and, second, that the credit was given originally to defendant and not to De Laney, and these were the principal issues tried.

From the evidence in the record we are satisfied the plaintiff failed to maintain the issue on his part. It is impossible to read it and arrive at any other conclusion. The question was, did defendant employ plaintiff to render medical services to De Laney before he entered upon the performance of the service? In other words, was the undertaking an original undertaking by defendant and so not

within the statute of frauds? Was defendant primarily liable? This is conclusively and satisfactorily answered by the plaintiff's acts, and that is, he made on his books the charge against De Laney, and against him alone, and in several different settlements had thereafter with defendant, at one of which a balance was found due defendant of thirty-five dollars, he never intimated to defendant that he held him liable for these medical services. The weight of the evidence is, the extent of defendant's promise was to pay him for a visit to De Laney, and that was all.

But the books of account of the plaintiff are of the most convincing and conclusive character. On them De Laney is the debtor. If one has a claim against another, and keeps books, it will so appear on the books, and it will require very strong evidence to show the entry was made by mistake. Here such proof is not attempted. It does appear that a long time after the charge was entered on the book against De Laney, the plaintiff added the defendant's name, and then brought a joint action against them. This goes to show still more satisfactorily that plaintiff did not consider defendant primarily liable.

We are satisfied the plaintiff did not maintain the issue on his part and establish a primary liability on the part of the defendant, and the verdict should have been for the defendant. The motion for a new trial should have been allowed. Refusing it was error, and for the error the judgment must be reversed. On the whole record we are satisfied plaintiff has no cause of action, and, therefore, will not remand the cause.

Judgment reversed.

MERIDEN BRITANNIA CO. v. ZINGSEN.

1872. 48 N. Y. 247.

EARL, COM.— * * * It is not every verbal promise to pay the debt of another that is void within this statute. There are many exceptions, as disclosed by the numerous cases upon the subject.

A promise to pay the debt of a third person is not within the statute where it is agreed between the parties, the creditor, debtor and promisor, that the debt shall be extinguished and the creditor shall look only to the promisor for payment upon the new promise. In such case no other person remains liable for the debt but the promisor, and his undertaking is not collateral but original to pay his own debt, and not to answer for the debt of another. There is then what is known in the civil law as a delegation, and the creditor takes a new debtor, who is called the delegated debtor.

In Anstey v. Marden, 4 Bos. & Pull. 124, Chief Justice Mansfield says that he did not see "how one person could undertake for the

debt of another when the debt for which he was supposed to undertake was discharged by the very bargain." In Mallory v. Gillet, 21 N. Y. 412, Chief Judge Comstock, after a very able review of many cases arising under the statute of frauds, gives a classification of the cases not within the statute, and of such cases are these: "When the original debt becomes extinguished and the creditor has only the new promise to rely upon; for example, when such new undertaking is accepted as a substitute for the original demand." In Throop on the statute of frauds, at pages 318, 322, 370, 374, will be found a very able and discriminating review of the cases upon this subject, and the author lays down these rules: "A promise to assume an antecedent liability of a third person is without the statute if the third person's liability had become extinct at the time when that of the promisor came into existence, or if the third person's antecedent liability to the promisee is discharged in consideration of its assumption by the promisor." And in this case it was distinctly agreed between the three parties—the creditor, debtor and promisor—that in consideration that the father of the debtor would pay the promisor $1,000 in money, and the debtor give him his own notes for the balance, the promisor would pay the claim of the creditor in plated ware in the months of February and March thereafter, and the creditor should release the debtor. It was obviously contemplated by the parties that all this should be done at the same time. In pursuance of this agreement the promisor executed the written undertaking to the creditor, and either then or soon after the creditor released the debtor and the $1,000 was paid and the debtor's notes given to the promisor, and the notes were subsequently paid. Hence this case is clearly within the rules above stated, and the promise of defendant is not within the statute of frauds. * * *

EDEN v. CHAFFEE.

1893. 160 Mass. 225, 35 N. E. 675.

KNOWLTON, J.—There was evidence to warrant a finding by the justice who heard the case that the plaintiff, in consideration of the promise of the defendant to pay him, gave up his claim against Titus, for whom he had dug and built a cellar on the defendant's land, and that Titus at the same time, and as a part of the same transaction, surrendered his contract and gave up his claim against the defendant. Here, then, was a promise on the part of the defendant, for a good consideration, to pay to the plaintiff the defendant's own debt created by the transaction, and not the debt of another, for the debt of Titus to the plaintiff then ceased to exist. The evidence, and the finding warranted by it, clearly make a case covered by the authori-

ties which hold that such a promise is not within the statute of frauds, and that the contract of which it is a part is not a collateral, but a substituted, contract. Wood v. Corcoran, 1 Allen (Mass.) 405; Lord v. Davison, 3 Allen (Mass.) 131; Walker v. Penniman, 8 Gray (Mass.) 233; Furbish v. Goodnow, 98 Mass. 296.

Exceptions overruled.

DELP v. BARTHOLOMAY BREWING CO.

1888. 123 Pa. St. 42, 15 Atl. 871.

CLARK, J.—On the 31st of January, 1887, Bingham & Spencer who were lessees and proprietors of the Hotel Albemarle, in the city of Pittsburg, executed a bill of sale to Sebastian Delp for the leasehold, with the furniture, fixtures, etc., and generally of the personal property used in or belonging to the hotel, including the stock of liquors on hand, with the outstanding claims, bills payable, etc. The consideration expressed was $3,500 to Bingham, $5,000 to Spencer, and the "further consideration of the said Sebastian Delp assuming to pay about $23,500 partnership debts of the late firm of Bingham & Spencer, proprietors," etc., "made in the furnishing and improving said hotel."

* * * The Bartholomay Brewing Company was not a party to this contract, and the general rule of the law is that no one can sue on a contract to which he is not a party; but there are several very well recognized exceptions to that rule. "Among the exceptions," as we said in the very recent case of Adams v. Kuehn, 119 Pa. St. 85, 13 Atl. 184, are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose; also, where one buys out the stock of a tradesman to take the place, fill the contracts and pay the debts of the vendor. These cases, as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned, in effect, into a trustee." This doctrine, asserted in a long line of cases, embracing Blymire v. Boistle, 6 Watts (Pa.) 182; Torrens v. Campbell, 74 Pa. St. 472; Kountz v. Holthouse, 85 Pa. St. 235; Hostetter v. Hollinger, 117 Pa. St. 611, 12 Atl. 741, and Adams v. Kuehn, *supra*, with many others, has become so firmly imbedded in our jurisprudence that it can be no longer questioned.

It is plain that the entire stock and asset of the Hotel Albemarle were placed in Delp's hands under the agreement that he would take

the place of Bingham & Spencer in the payment of their debts. Delp, by the very terms of the agreement, held the property and effects of Bingham & Spencer for the benefit of such of their creditors as had just claims contracted in the course of their business. He assumed the payment of these debts, and the property was put into his hands for this express purpose. Whether thereby a technical trust was created is not material. It has always been held that the creditor in such a case has a right of action to compel payment in accordance with the agreement. The act of April 26, 1885, requiring a promise to pay the debt or to answer for the default of a third person has no application. Stoudt v. Hine, 45 Pa. St. 30; Clymer v. De Young, 54 Pa. St. 118; Taylor v. Preston, 79 Pa. St. 436. * * *

BROWN ET AL. v. BROWN ET AL.

1870. 47 Mo. 130.

BLISS, J.— * * * The provision that no action shall be brought to charge any person upon a promise to answer for the debt of another, unless it is made in writing, is construed to apply to promises made to the creditor, and hence it is always held that while the creditor cannot recover upon a collateral parol agreement made with him to pay his debtor's obligation, yet if such agreement be not made with the creditor it can be enforced if otherwise good, though not evidenced by any note or memorandum in writing. (Howard v. Coshow, 33 Mo. 118; Hargreaves v. Parsons, 13 M. & W. 561; Eastwood v. Kenyon, 11 Ad. & E. 438; Westfall v. Parsons, 16 Barb. (N. Y.) 645; Barker v. Bucklin, 2 Denio (N. Y.) 45; Pratt v. Humphrey, 22 Conn. 317; Alger v. Scoville, 1 Gray (Mass.) 391; Perkins v. Littlefield, 5 Allen (Mass.) 370.)

The authorities cited by defendants' counsel go rather to the consideration of such promise, and to the inquiry whether it is an independent or collateral agreement. It is held that a parol contract with the creditor to pay the debt of another can in general only be enforced when the original debt is canceled, and the third person is alone looked to for the debt. It then becomes an independent agreement to assume the debt. It is not a collateral promise, for the original debt is discharged. It becomes the debt of the promisor alone and is no longer the debt of another, and hence it is not within the statute.

So, also, as we have seen, an agreement to pay and discharge the debt, made with the debtor or some person interested for him, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or object of the stat-

ute. It is neither uncommon nor is it unreasonable for a debtor to make provision by contract for the payment of his obligations; and if a purchaser of property, instead of paying the whole consideration, should assume to pay certain liabilities of his vendor and be able to escape his obligation and retain the property, the statute would be one of frauds in a new sense. No such construction has ever been given it, and the courts of New York go so far as to hold that though not a party to this independent agreement the creditor may avail himself of it and sue in his own name. (Barker v. Bucklin, *supra.*) * * *

WILSON v. BEVANS.

1871. 58 Ill. 232.

A PURCHASER of personal property, in consideration thereof, verbally promised the vendor to pay certain of his debts to a third person.

SCOTT, J.— * * * We think that the legal effect of the undertaking of the appellant, brings the promise upon which the action is based, within the principle of law here stated (Eddy v. Roberts, 17 Ill. 505) and relieves the promise from the operation of the statute of frauds. It appears that the appellant purchased of one Hire certain articles of personal property, and also his interest in the lease upon a certain farm, in consideration of which he was to pay certain debts of Hire, including the debt for which appellee was surety for Hire, to Mr. Sterling. Instead of paying the purchase money of the articles purchased directly to Hire, the appellant undertook and agreed to pay the same to certain creditors. This would constitute an original and independent promise and undertaking on the part of the appellant in nowise collateral to or dependent on the liability of Hire, and such a promise is not within the statute of frauds.

The appellant received the property contracted for, and it is wholly immaterial to him what direction was given to the purchase money. The vendor contracted to have it paid to his creditors instead of himself, and it imposes no hardship upon the purchaser. It was his contract so to pay the purchase money, and such a contract is valid and binding in law, although it is not evidenced by any writing. * * *

JONES v. BACON.

1895. 145 N. Y. 446, 40 N. E. 216.

ANDREWS, C. J.—The oral promise of the defendant's testator to the plaintiff was, in substance, a promise of indemnity in case the plaintiff would become indorser on the note of Kingsbury to the banking firm of McKechnie & Co. for a debt of Kingsbury to the bank. The plaintiff thereupon indorsed the note of Kingsbury to the bank, and has been compelled to pay thereon the sum of about $16,000, Kingsbury having made default and being insolvent. This is a statement of the facts in the simplest form, and the question arises whether the oral promise by the defendant's testator to indemnify the plaintiff was void, under the statute of frauds, as being a promise to "answer for the debt, default or miscarriage of another person." 2 Rev. St. 135, § 2, subsec 2. This is no longer an open question in this state. It was decided in Chapin v. Merrill, 4 Wend. (N. Y.) 657, that a promise by one person to indemnify another for becoming a guaranty for a third is not within the statute and need not be in writing, and that the assumption of the responsibility was a sufficient consideration for the promise. The doctrine of Chapin v. Merrill was approved in Mallory v. Gillet, 21 N. Y. 412, in Sanders v. Gillespie, 59 N. Y. 250, and Tighe v. Morrison, 116 N. Y. 263, 22 N. E. 164, and in other cases in this court. The same doctrine now prevails in the English courts. Thomas v. Cook, 8 Barn. & C. 728; Reader v. Kingham, 13 C. B. (N. S.) 344; Wildes v. Dudlow, L. R. 19 Eq. 198. We do not deem it proper to re-open the discussion, or to refer to cases where a different view has prevailed. The court below considered the subject at large, and the able opinion of Bradley, J. (see 72 Hun (N. Y.) 506, 25 N. Y. S. 212), refers to many of the cases on the subject. * * *

ALDRICH v. AMES.

1857. 9 Gray (Mass.) 76.

SHAW, C. J.— * * * The case in substance, is, that the plaintiff, at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless.

The ground of defense is, that this was an alleged promise of the defendant to pay the debt of another, and therefore that the action cannot be maintained without an agreement in writing, because it is within the statute of frauds.

The court are of opinion that this ground is wholly untenable.

This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds.

The theory of the statute of frauds is this; that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case, should C, on good consideration, promise A, the debtor, to pay the debt to B and indemnify A from the payment, although one of the results is to pay the debt to B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt.

This rule appears to us to be well settled as the true construction of the statute, well confirmed by authorities. Eastwood v. Kenyon, 11 Ad. & El. 438, and 3 P. & Dav. 276; Harrison v. Sawtel, 10 Johns. (N. Y.) 242; Chapin v. Merrill, 4 Wend. (N. Y.) 657; Chapin v. Lapham, 20 Pick. (Mass.) 467; Alger v. Scoville, 1 Gray (Mass.) 395.

And see, Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875. But in some states it is held that a mere promise of indemnity is within the statute. May v. Williams, 61 Miss. 125; Nugent v. Wolfe, 111 Pa. St. 471, 4 Atl. 15; Wolverton v. Davis, 85 Va. 64, 6 S. E. 619; Hartley v. Sanford, 66 N. J. L. 627, 50 Atl. 454; Gansey v. Orr, 173 Mo. 532, 73 S. W. 477.

A contract between co-sureties fixing the proportion and extent of their several or correlative liability as between themselves is held to be an original understanding and not within the statute. See Benjamin, Principles of Contract, p. 99.

MALONE ET AL. v. KEENER.

1862. 44 Pa. St. 107.

CONTRACTORS to build a railroad, on settlement with a sub-contractor for work done for them, gave in part payment one of the notes of the company, verbally agreeing to pay it if the company did not.

READ, J.—The declaration in this case is very inartificially drawn,

but it is clear that it is upon a guaranty by the plaintiffs in error of a note of the North-Western Railroad Company. The guaranty was not in writing, and the question is whether it comes within the 1st section of the Act of 26th April, 1855, and this depends upon the construction which has been given to its provisions.

It is a general principle which prevails in all cases under the 4th section of the Statute of Frauds, from which our act is copied, that whenever the defendant's promise is in effect to pay his own debt, though that of a third person be incidentally guaranteed, it is not necessary it should be in writing. The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself. The common case of the holder of a third person's note assigning for value with a guaranty, seems to be clearly referable to this principle. The assignor owes the assignee, and that particular mode of paying him is adopted; he guarantees in substance his own debt: Brown on Stat. of Frauds, § 165.

The cases of Brown v. Curtiss, 2 Com. (N. Y.) 229, and Johnson v. Gilbert, 4 Hill (N. Y.) 178, support and exemplify this position to its fullest extent. Both these cases were guaranties of promissory notes given in payment by a debtor to a creditor. In the last-named case Judge Bronson says: "But the Statute of Frauds has nothing to do with the case. That only applies where the person making the promise stands in the relation of a surety for some third person who is the principal debtor. This was not an undertaking by the defendant to pay the debt of Eastman, but it was an agreement to pay his own debt in a particular way," and in the first-named case the same judge says: "The defendant was a debtor to the plaintiff, and gave the note with the guaranty to satisfy that debt. * * * In such cases, where the party undertakes for his own benefit and upon a full consideration received by himself, the promise is not within the statute. It would be good without any writing."

This was really the principle upon which the court below put this case to the jury, and the declaration is sufficient to sustain it. The note was given in part payment of work done by the plaintiff for the defendants on the North-Western Railroad, and the defendants promised and agreed that if the said North-Western Railroad Company did not pay the amount of said note, then they, the said defendants, would pay the same to the plaintiff. The evidence supported this aspect of the case, and the court thought so and the jury agreed with them. The real justice of the case having therefore been reached, and no rule of law obliging us to reverse the decision of the court below.

The judgment is affirmed.

WOLFF & HENDRICKS v. KOPPEL.

1843. 5 Hill (N. Y.) 458.

COWEN, J.—It is objected that the contract of a factor, binding him in the terms implied by a *del credere* commission, is within the Statute of Frauds and should, therefore, be in writing. * * * The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another—some future vendee, to whom the merchant is first to resort. Upon non-payment by the vendee, the debt falls absolutely on the factor. As remarked by Parker, Ch. J., in Swan v. Nesmith, 7 Pick. (Mass.) 220, the form of the action does not seem to be material in such case; that is to say, whether the merchant sue for goods sold, or on the special engagement. The latter is perhaps the settled form; but still the action is, in effect, to recover the factor's own debt. In the late case of Johnson v. Gilbert, 4 Hill (N. Y.) 178, the defendant, in consideration of money paid for him by the plaintiff, assigned a chattel note and guarantied its payment. In such a case the declaration must be on the guaranty to pay the debt of another; but this is so in form merely. We held that the contract was to pay the defendant's own debt; that it was not a contract to pay as the surety of another. All such contracts and many others are, in form, to pay the debt of another, and so literally within the statute, but without its intent. A promise by A to B, that the former will pay a debt due from the latter, is not within the meaning, though it is within the words. Conkey v. Hopkins, 17 Johns. (N Y.) 113; Eastwood v. Kenyon, 11 Ad. & Ell. 438. So are a numerous class of cases, where the promise is made in consideration of the creditor relinquishing some lien, fund or security. Theobald, Pr. and Surety, 45, and cases cited. The merchant gives up his goods to be sold, and pays a premium. Is not this in truth as much and more than many of those cases require which go on the relinquishment of a security? Suppose a factor agrees by parol to sell for

cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute? The amount of the argument for the defendant would seem to be, that an agent for making sales, or indeed, a collecting agent, cannot, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages.

Judgment affirmed.

Affirmed, 2 Denio (N. Y.) 368.

CRAWFORD v. KING.

1876. 54 Ind. 6.

HOWK, J.—* * * In 1 Throop on the Validity of Verbal Agreements, 157, a rule is laid down, which is strongly supported by both English and American authorities, which is right in principle, and which, in our opinion, is applicable to and decisive of the case now under consideration. This rule is thus stated:

"A promise to pay the debt of another is not within the statute, if its consideration was the abandonment to the promisor of a security for the payment of the debt, consisting of a lien upon or interest in property, to which the promisor then had a subordinate title."

In this case, appellee's deceased husband was the owner, at the time of his death, of personal property more than sufficient to pay all his debts, including the note described in appellant's complaint. By the death of her husband, appellee, as his widow, acquired a title to his personal property, which was subordinate, however, to the interest of his creditors, appellant included, in said property. Before the estate of the deceased was finally settled, appellant presented his note to the administrator of the decedent, as a claim against said estate, for payment, and the administrator was about to pay the note, when, it is averred, that the appellee, "then and there, by a verbal agreement, agreed with and promised" appellant, "that if he would not require and demand payment of the amount due on said note, from and by said administrator, out of the assets of said estate, and not file said note as a claim against said estate," she, the appellee, would pay the amount thereof to appellant, "if the said Gentry, who was then, and has ever since been and remained, totally insolvent, and who was the principal in said note, did not pay the same" to appellant. Relying upon appellee's promise and agree-

ment, appellant did not require and demand payment of his note by said administrator, and the money, which, without appellee's promise and agreement, would have been paid to appellant on his note, was paid over by the administrator to appellee. If the averments of appellant's complaint are true, and for aught that has yet appeared in this cause they are strictly and literally true, it would be manifest injustice to allow the appellee to escape the fulfilment of her "promise and agreement."

In Templetons v. Bascom, 33 Vt. 132, the facts of the case were very similar to the facts in this case. There, it appeared that plaintiffs were the creditors of the father of the defendant, who had died intestate and the owner of considerable estate; that defendant was his only child, and was entitled to all his estate, after the payment of his debts; and that, in consideration that plaintiffs would not present their claim to the commissioners upon the estate, appointed by the probate court, or take the necessary legal steps to have it chargeable upon the estate, the defendant repeatedly promised to pay them the amount; and it further appeared that the delay in presenting the claim had caused the plaintiffs to lose their claim against the estate as the commissioners had reported, and the report had been confirmed.

In delivering the opinion of the court, Kellogg, J., said: "In view of the interest which the defendant had in that estate, such forbearance, or the agreement for it, on the part of the plaintiffs, at the request of the defendant, ought to be regarded as a sufficient consideration for the defendant's promise to pay the debt." And again, the learned judge said: "The consideration of the promise of the defendant was the waiving by the plaintiffs of their remedy against the estate of the defendant's father—a remedy to which they had an unquestionable right,—for the benefit of the defendant, and at his request. His promise to pay the debt to the plaintiffs was founded not on the consideration of the original debt, but on a new consideration distinct from it, moving from the plaintiffs directly to himself, the entire benefit of which was anticipated or received by him."

In all essential particulars, the case last cited is almost identical in its facts and circumstances with the case now under consideration; and the conclusion of the court in that case, that the promise of the defendant was not within the statute of frauds, in our opinion, was clearly correct. * * *

BORCHSENIUS v. CANUTSON.

1881. 100 Ill. 82.

A SURVIVING partner holding a policy of insurance upon the life of the deceased partner in pledge for his partnership indebtedness to him, surrendered such policy upon the promise of the widow of the decedent to pay the debt of her deceased husband, whereby she was enabled to collect money to be applied upon her specific allowance as widow.

PER CURIAM. * * * The fifth replication to the third plea was the Statute of Frauds, that plaintiff's promise was to pay the debt of another, and was not in writing, and so not binding under that statute.

In Wilson v. Bevens, 58 Ill. 232, this court held, that where a purchaser of personal property agreed, verbally, in consideration of the purchase, to pay certain debts of his vendor due to a third person, the promise was not a collateral one, but an original promise, and not within the Statute of Frauds. To similar effect was Meyer v. Hartman, 72 Ill. 442.

In Clifford v. Luhring, 69 Ill. 401, it was recognized to be the doctrine that where the leading object of the undertaking is to promote some interest of the party's own, his promise to pay is not within the Statute of Frauds, although its effect is to release or suspend the debt of another. To like effect see Emerson v. Slater, 22 How. (U. S.) 43.

In Curtis v. Brown, 5 Cush. (Mass.) 491, the court say: "Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where, by means of such relinquishment, the same interest or advantage has inured to the benefit of the defendant—in such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right or benefit in question. * * * But where the original debt still subsists, and where the plaintiff has relinquished no interest or advantage which has inured to the benefit of the defendant, it is not an original contract, but a contract to pay another's debt, and must be in writing." * * *

We are of opinion that the promise here comes within the principle of the above decisions, and that although in form a promise to pay the debt of another, it is to be regarded as an original contract, and is not within the Statute of Frauds. * * *

AMES v. FOSTER ET AL.

1871. 106 Mass. 400.

IN this case the mortgagee of part of a vessel made an oral promise to persons who had furnished her with supplies, for which they had no lien on her, to pay the debt if they would not attach the interest of the other part owners.

MORTON, J.—The only question involved in this case arises under that clause of the statute of frauds which provides that no action shall be brought "to charge a person upon a special promise to answer for the debt, default or misdoings of another, unless the promise, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or his agent." Gen. Sts., c. 105, § 1, cl. 2.

The plaintiffs in the original action claim to hold the defendant upon the ground of an express promise to pay the amount of a debt due the plaintiffs by the owners of the steamer N. P. Banks, for wood and coal furnished prior to October 1, 1868. At this time, McKay & Aldus, of Boston, owned three-fourths of the steamer, and the other fourth was owned by parties in New York. In December, 1868, McKay & Aldus went into bankruptcy, having previously mortgaged their interest to the defendant Ames. In the spring of 1869 the plaintiffs heard that the steamer was to be carried to New York to be sold, and they threatened to attach her, and thereupon Ames promised to pay the bill if they would not attach her.

It is to be observed that Ames was not originally liable upon the bill, being merely a mortgagee. Howard v. Odell, 1 Allen (Mass.) 85. The plaintiffs do not claim that they had a lien upon the vessel. They had no right to attach the interest of McKay & Aldus, who were in bankruptcy. The only legal consideration, therefore, of the defendant's promise, was the forbearance of the plaintiffs to attach the interest of the New York owners. Upon this state of facts, the learned judge who presided at the trial instructed the jury that "if, for the benefit and at the request of Ames, the said Foster gave up or surrendered some advantage which he had, as a means of collecting his debt or the like, and in consideration thereof Ames promised to pay this bill, he would be liable, although the promise was not in writing." We do not think that these instructions, applied to the facts of this case, were correct or sufficient. As we have seen, the only consideration of the defendant's promise was that the plaintiffs forbore to attach the interest of the New York owners; and we are of opinion that the jury should have been instructed that such promise was within the statute of frauds.

The defendant's promise was, in its primary and essential character, a promise to guarantee the debt of another. Its object was, to secure the payment of the old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist

as long as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an entire absence of any liability on the part of the defendant or his property, except such as arises from his express promise. Forth v. Stanton, 1 Saund. (6th ed.) 211, note. When all these elements concur, we know of no case in this commonwealth which sanctions the doctrine that such promise loses its character as collateral, and becomes an original promise, because there is a consideration which is beneficial to the promisor.

In Alger v. Scoville, 1 Gray (Mass.) 391, 396, Shaw, C. J., says that "it has been held that when the leading and obvious object of the promisor was to induce the promisee to forego some lien, interest, benefit or advantage held by him, and to transfer that interest, or confer that or some equivalent benefit on the promisor, although the effect may be to discharge neither from an obligation, still it is a new, independent and original contract between the parties, and is not within the statute of frauds required to be in writing."

In Curtis v. Brown, 5 Cush. (Mass.) 488, Shaw, C. J., states that "it is no sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage has not also directly enured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has enured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right or benefit in question."

It is equally true that it is no sufficient ground for taking the case out of the statute, that the defendant has received some benefit from the consideration of his promise. If this were so, then every promise to guarantee the debt of another, made upon a pecuniary consideration paid by the promisee to the promisor, would be taken out of the statute. In all cases, the question is, whether the promise is in substance a promise to pay the debt of another, or whether it is a promise by the promisor to pay his own debt, the extent of which is measured by the amount due by another.

We think the authorities in this state have gone no further than to decide that a case is not within the statute, where, upon the whole transaction, the fair inference is, that the leading object or purpose and the effect of the transaction was the purchase or acquisition by the promisor from the promisee of some property, lien or benefit which

he did not before possess, but which enured to him by reason of his promise, so that the debt for which he is liable may fairly be deemed to be a debt of his own, contracted in such purchase or acquisition. Nelson v. Boynton, 3 Met. (Mass.) 396; Fish v. Thomas, 5 Gray (Mass.) 45; Burr v. Wilcox, 13 Allen (Mass.) 269; Furbish v. Goodnow, 98 Mass. 296; Browne on St. of Frauds (3d ed.), § 214, c. d.

Applying this test to the facts of this case, it is clear that the promise of the defendant Ames was within the statute. It is true, or probable, that he indirectly received some benefit from the forbearance of the plaintiffs to attach the interest of the New York owners, but the purpose or effect of the transaction was not to transfer to him any lien or advantage. He acquired no rights which he did not before possess, and it is impossible to regard the promise as an original promise founded upon the consideration of a purchase by him. We are of opinion, therefore, that the jury should have been instructed in accordance with the request of the defendant Ames, that the plaintiff upon the facts found was not entitled to recover.

Exceptions sustained.

WILLS ET AL. v. SHINN.

1880. 42 N. J. L. 138.

IN this case there was an oral promise to endorse a promissory note with others for the purpose of raising money to pay the debt of a third party.

REED, J.— * * * The case against William Wills and Moses Wills is, that they promised to go on a note to help refund to Shinn the amount he had paid for George Wills. Their promise, therefore, amounted to a promise to assist in refunding to Shinn a portion of the debt which George Wills owed Shinn by reason of his payment of the sum already mentioned, with no beneficial consideration moving to the promisors. The promise was within the terms of the statute of frauds, and is, therefore, unenforceable. Birkmyr v. Darnell, 1 Smith Lea. Cas. 371; Cowenhoven v. Howell, 7 Vroom (N. J. L.) 323. And although the promise was in the shape of a promise to endorse, it was equally unenforceable. Brown on Frauds, § 174; Carville v. Crane, 5 Hill (N. Y.) 483. * * *

§ 29.—Agreement Upon Consideration of Marriage.

SHORT v. STOTTS.

1877. 58 Ind. 29.

ACTION for breach of promise to marry.

WORDEN, J.—* * * It is insisted, that the contract is within the statute of frauds, which provides, that no action shall be brought "to charge any person, upon any agreement or promise, made in consideration of marriage," unless the contract shall be in writing. 1 R. S. 1876, p. 503, § 1, cl. 3.

Our statute, in this respect, is like that of 29 Car. 2, of which Chitty says:

"Nor need a promise to marry be reduced into writing; for the statute 29 Car. 2, c. 3, s. 4, applies to promises 'in consideration of marriage,' not to promises to marry." 2 Chitty Contracts, 11th Am. ed., p. 791.

To the same effect are the cases of Clark v. Pendleton, 20 Conn. 495, and Ogden v. Ogden, 1 Bland. (Md.) 284.

Whatever may have been the early decisions upon this point, the law is well settled as above stated. * * *

HUNT v. HUNT ET AL.

1902. 171 N. Y. 396, 64 N. E. 159.

WERNER, J.—This action was brought to compel the specific performance of an oral ante-nuptial contract which was entered into between the plaintiff and Wilson G. Hunt, the testator of the defendants, prior to their intermarriage in October, 1896. Under said contract, and in consideration of plaintiff's promise to marry said Wilson G. Hunt, the latter orally agreed to give the former at once the sum of $5,000 in money, the further sum of $2.50 per week, the income of a house and lot in the city of Geneva, N. Y., to convey to her another house and lot in the same city, and to make a will giving her all of his property except a watch and $200. The making of this contract, the subsequent intermarriage of the parties thereto, and the still later breach of the agreement by said Wilson G. Hunt, are established by the findings of the learned trial court, and upon these findings it based the conclusion of law that plaintiff is not entitled to recover because said contract is void under the statute of frauds. * * * The letter of the law bears its own interpretation. This view of the statute is not original. Pomeroy, in his work on Contracts, under the head of "Specific Performance" (2d ed, § 111),

states it most forcibly as follows: "When a verbal contract is made in relation to or upon the consideration of marriage, the marriage alone is not a part performance upon which to decree specific execution. This rule, which is firmly established is based upon the express language of the statute. A promise made in anticipation of a marriage, followed by a marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential. In fact, until a marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it, which the legislature has said must be in writing." Beach, in his Modern Equity Jurisprudence (§ 622), says: "It is well settled that marriage is not an act of part performance which will take a parol contract out of the statute, for the statute expressly provides that a contract in consideration of marriage shall not be binding unless it is in writing." This is also the view of the statute entertained by the courts of England and the courts in other jurisdictions where the English statute of frauds has been copied. Caton v. Caton, L. R. 2 H. L. 127, affirming 1 Ch. App. 137; Taylor v. Beech, 1 Ves. Sr. 297; Dundas v. Dutens, 1 Ves. Jr. 196; Lassence v. Tierney, 1 Macn. & G. 551; Warden v. Jones, 23 Beav. 487; Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. 244; Bradley v. Saddler, 54 Ga. 681; McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; Henry v. Henry, 27 Ohio St. 121. * * *

RILEY ET AL. v. RILEY.

1856. 25 Conn. 154.

A, about seven years before her marriage to B, loaned him $320, for which he gave her his two promissory notes, and in an interview with her, in contemplation of marriage, and shortly before that event, he promised her, that if she would not enforce the payment of the notes, they should remain good and collectible against his estate. He also, after the marriage, directed her to keep the notes, and said they would be good against his estate. A, always retained possession of the notes until after the death of B. * * *

ELLSWORTH, J.— * * * As to the objection derived from the statute of frauds and perjuries, we think there is no ground for it. The ante-nuptial promise was made in consideration of forbearance, and not in consideration of marriage, though it was made in contemplation of marriage, which is not inconsistent with the claim of the appellant's counsel, that a promise in consideration of marriage

must be in writing. Marriage was not the meritorious cause of Riley's promise; the marriage obligation was already perfect, and the promise in question was made upon the assumption that it was so, and for the exact purpose of saving the notes from the effect of the marriage, when the marriage contract should be executed. No advancement or benefit was to accrue to either party in the event of the marriage, any more than if it did not take place, and hence it is not possible to consider marriage as the consideration of the promise. It was the debt—the forbearance of it; and, this forbearance having been extended upon the request of Riley, and continued until his death, there is no reason why his estate should not be liable. * * *

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§ 30.—Agreement Not to be Performed Within One Year from the Making Thereof.

RUSSELL v. SLADE ET AL.

1838. 12 Conn. 455.

ACTION of assumpsit upon agreement that plaintiff should labor for defendants during the term of one year.

BISSELL, J.—In regard to that branch of the statute of frauds, upon which the question in this case arises, the rule is certainly well settled, that unless it appears, that the agreement is not to be performed until after the expiration of a year, it need not be in writing. Thus, if it be on a contingency that may happen within the year, but which does not actually happen until after its expiration; the agreement has been held not to be within the statute. Anon. 1 Salk. 280; Smith v. Westall, 1 Ld. Raym. 316; Fenton v. Emblers, 3 Burr. 1278.

So also it has been repeatedly adjudged, that unless it appear from the agreement itself, that it is *not* to be performed within a year, the statute does not apply. In the case cited from Burrow, Mr. Justice Dennison thus lays down the rule: "The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year." 3 Burr. 1281.

The same rule, substantially, is asserted, by the supreme court of the state of New York, in the case of Moore v. Fox, 10 Johns. (N. Y.) 244. The courts there say: "To bring the case within the statute of frauds there must be an express agreement, not to be performed within the space of a year." See also Lower v. Winters, 7 Cow. (N. Y.) 263; McLees v. Hale *et al.*, 10 Wend. (N. Y.) 426.

The case of Boydell v. Drummond, 11 East. 142, does not conflict with these authorities; but obviously proceeds upon the same general principle; for there it was the manifest understanding of the parties, that the contract was not to be completed within a year; although it might, and in fact was, in part performed, within that time.

Now, it will be readily conceded, that the agreement before us might have been performed within the year, and so would not be within the statute, if the plaintiff's services might have commenced immediately upon the making of the contract. There was no stipulation as to any future time; nor was there anything, in the nature of the contract, which forbade an immediate tender of the plaintiff's services. The jury were told, that under these circumstances, the services might, and they have found they *were* to commence immediately. * * *

DERBY v. PHELPS.

1822. 2 N. H. 515.

ACTION for breach of promise to marry at the expiration of about five years.

WOODBURY, J.—Our statute "to prevent frauds and perjuries," provides, among other things, "that no action shall be brought whereby to charge any person upon an agreement made upon consideration of marriage, or upon any agreement, that is not to be performed within the space of one year from the time of making it, unless such promise or agreement be in writing," etc.

The defendant cannot avail himself of the first clause above cited; because, though once decided in Philpott v. Wallet, 3 Lev. 65, that a contract to marry must in all cases be in writing; yet, that decision has since been overruled in Cork v. Baker, 1 Stra. 34, and in Harrison v. Cage and wife, 1 Ld. Ray. 386; Salk. 24; 5 Mod. 411; Bull. N. P. 280; 2 Eq. Ca. Ab. 248; Skin. 196.

This clause of the statute is now held to reach not mutual promises to marry, but only promises for other things made in consideration of marriage. Bac. Ab. "Agreement," C. 3.

But under the other clause of the statute, we apprehend the objection to the evidence must be adjudged fatal. This was an agreement, which by the terms of it was not to be performed till the expiration of about five years; and hence comes within the very teeth of the statute. Had the tenor of the agreement been, that the contract should be fulfilled on a certain event, which might or might not have happened within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute. 1 Salk. 280; Skin. 326; Stra. 34; Burr. 1278; 1 Bl. Rep. 353; 1 Ld.

Ray. 317; Com. Rep. 49; Holt 326; 3 Salk. 9; 10 John. Rep. 244.
But such was not the tenor of it. * * *

BLACKBURN v. MANN.

1877. 85 Ill. 222.

ACTION for breach of general promise to marry.

SCOTT, J.—* * * The instruction, that if plaintiff and defendant made a mutual contract to marry, and by the terms of such contract no time was agreed upon when the marriage should take place, then the law is, it is a contract to marry within a reasonable time, is challenged, not so much because it does not state a correct legal principle, but because it is not applicable to the facts of the case. It is conceded it would be law as to all general promises to marry. Such a promise is alleged in the declaration, and as we understand the testimony, such a promise is proven. The vice of the whole argument for the defense, as we have before intimated, lies in the assumption the promise of marriage proven is a conditional one. That is not the fact. It was an absolute promise, if the testimony of plaintiff is to be believed, and the jury have regarded it as true, subject to no conditions nor the happening of any contingency. What was said, that it might be one year or ten, or as to the death of plaintiff's parents, were mere casual expressions, made when considering the probable date they would fix for the consummation or celebration of their marriage. Giving this interpretation to these expressions, the case is relieved of all the difficulty suggested by the argument for the defense. * * *

LAWRENCE v. COOKE.

1868. 56 Me. 187.

ACTION for breach of promise to marry within four years.

DICKERSON, J.—Several questions are reserved by the defendant.

1. That the verbal promise proved is void by the statute of frauds, as it was not to be performed within a year. The testimony upon this point was, that the defendant said to the plaintiff that he was not able to marry her then, but promised to marry her within four years. It is obvious that this promise might have been performed within a year; and it does not appear that the parties understood that it was not to be performed within that time. It is well settled that such a promise need not be in writing. Linscott v. McIntire, 15 Maine 201. * * *

WARNER v. TEXAS & PACIFIC RY. CO.

1896. 164 U. S. 418.

ACTION for breach of agreement to put down the iron rails for a switch on defendant's railroad and maintain the switch for plaintiff's benefit for shipping purposes "as long as he needed it" at the place where he proposed to erect a sawmill.

GRAY, J.—The statute of frauds of the state of Texas, re-enacting, in this particular, the English Statute of 29 Car. II, chap. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized."

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several states.

In the earliest reported case in England upon this clause of the statute, regard seems to have been had to the time of actual performance, in deciding that an oral agreement that if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him 50 guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet if the contingent happen within a year, the action shall be maintainable, and is not within the statute." Francam v. Foster (1692), Skin. 326; Holt. 25.

A year later another case before Lord Holt presented the question whether the words "agreement not to be performed within one year" should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised, for one guinea paid, to pay the plaintiff so many at the day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were

impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement, and laid down this rule: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." Peter v. Compton (1693), Skin. 353, Holt 326, cited by Lord Holt in Smith v. Westfall, 1 Ld. Raym. 316, 317; Anonymous, Comyns, 40, 50, Comb. 463.

Accordingly, about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year. Anonymous, 1 Salk. 280.

Again, in a case in the King's bench, in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. Fenton v. Emblers, 3 Burr. 1278, 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute; although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. Tucker v. Oxley, 9 U. S. 5 Cranch 34, 42; Pennock v. Dialogue, 27 U. S. 2 Pet. 1, 18; McDonald v. Hovey, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England

and America, although it may in a few instances have been warped or misapplied.

The decision in Boydell v. Drummond (1809), 11 East. 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case, the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of 3 guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number at least should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare subscribers, their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, LeBlanc and Bayley, the contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In Wells v. Horton (1826), 4 Bing. 40, 12 J. B. Moore 177, it was held to be settled by the earlier authorities that an agreement by which a debtor, in consideration of his creditor's agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute; and Chief Justice Best said: "The present case is clearly distinguishable from Boydell v. Drummond, where upon the face of the agreement it appeared that the contract was not to be executed within a year."

In Souch v. Strawbridge (1846), 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as Chief Justice Tindal said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof;' pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly

from the case of Boydell v. Drummond, 11 East 142, the rule to be extracted from which is, that, when the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

In Murphy v. O'Sullivan (1866), 11 Ir. Jur. (N. S.) 111, the court of exchequer chamber in Ireland, in a series of careful opinions by Mr. Justice O'Hagan (afterwards Lord Chancellor of Ireland), Baron Fitzgerald, Chief Baron Pigot and Chief Justice Monahan, reviewing the English cases, held that under the Irish statute of frauds of 7 Wm. III, chap. 12 (which followed in this respect the words of the English statute), an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of McGregor v. McGregor (1888), L. R. 21 Q. B. Div. 424, the English court of appeals held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain herself and her children, and to indemnify him against any debts contracted by her, was not within the statute. Lord Esher, M. R., thought the true doctrine on the subject was that laid down by Chief Justice Tindal in the passage above quoted from Souch v. Strawbridge. Lord Justice Lindley said: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply." Lord Justice Bowen said: "There has been a decision which for two hundred years has been accepted as the leading case on the subject. In Peter v. Compton, it was held that 'an agreement that is not to be performed within the space of a year from the making thereof' means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in Murphy v. O'Sullivan, above cited, and to disapprove the opposing decision of Hawkins, J., in Davey v. Shannon, 4 Exch. Div. 81.

The cases on this subject in the courts of the several states are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in Browne on the Statute of Frauds (5th ed.) chap. 13, that we shall refer to but few of them, other than those cited by counsel in the case at bar.

In Peters v. Westborough, 19 Pick. (Mass.) 364, 31 Am. Dec. 142, an agreement to support a girl twelve years old until she was eighteen was held not to be within the statute. Mr. Justice Wilde, in delivering judgment, after quoting Peter v. Compton, Skin. 353;

Fenton v. Emblers, 3 Burr. 1278, and Boydell v. Drummond, 11 East 142, said: "From these authorities it appears to be settled that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this, we think, is the clear meaning of the statute. In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year."

In many other states, agreements to support a person for life have been held not to be within the statute. Browne, Stat. Fr., § 276. The decision of the supreme court of Tennessee in Deaton v. Tennessee Coal & R. Co., 12 Heisk. (Tenn.) 650, cited by the defendant in error, is opposed to the weight of authority.

In Roberts v. Rockbottom Co., 7 Met. (Mass.) 46, Chief Justice Shaw declared the settled rule to be that "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year;" and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more clearly that the contract might end within a year, if Leforest should quit the agency within that time."

In Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 720, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered, as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed, that is, incapable in any event of being performed, within one year from the time it is made;" and that "if by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary;" and therefore that an agreement by a physician to sell out to another

physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other states are to the same effect. Browne, Stat. Fr., § 277.

In Hinckley v. Southgate, 11 Vt. 428, cited by the defendant in error, the contract held to be within the statute of frauds was in express terms to carry on a mill for a year from a future day; and the suggestion in the opinion that if the time of performance depends upon a contingency, the test is whether the contingency will probably happen, or may reasonably be expected to happen, within the year, was not necessary to the decision of the case, and cannot stand with the other authorities. Browne, Stat. Fr., § 279.

In Linscott v. McIntire, 15 Me. 201, 33 Am. Dec. 602, also cited by the defendant in error, an agreement to sell a farm at the best advantage, and to pay to the plaintiff any sum remaining after refunding the defendant's advances and paying him for his trouble, was held not to be within the statue of frauds, Chief Justice Weston saying: "The sale did not happen to be made until a year had expired; but it might have taken place at an earlier period, and there is nothing in the case from which it appears that, in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection that it depended on a contingency, which might not and did not happen until after that time."

In Herrin v. Butters, 20 Me. 119, likewise cited by the defendant in error, the contract held to be within the statute could not possibly have been performed within the year, for it was to clear eleven acres, one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following, and to receive in consideration thereof all the proceeds of the land, except the two acres first seeded down.

In Broadwell v. Getman, 2 Denio (N. Y.) 87, the supreme court of New York stated the rule thus: "Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be, carried into full execution until after the expiration of that period of time." The contract there sued on was an agreement made in January, 1841, by which the defendant agreed to clear a piece of woodland for the plaintiff, and to partly make a fence at one end of it, which the plaintiff was to complete, the whole to be done by the spring of 1842; and the defendant was to have for his compensation the wood and timber, except that used for the fence, and also the crop to be put

in by him in the spring of 1842. The court well said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute."

In Pitkin v. Long Island R. Co., 2 Barb. Ch. (N. Y.) 221, cited by the defendant in error, a bill in equity to compel a railroad company to perform an agreement to maintain a permanent turnout track and stopping place for its freight trains and passenger cars in the neighborhood of the plaintiff's property, was dismissed by Chancellor Walworth upon several grounds, the last of which was that, as a mere executory agreement to continue to stop with its cars at that place, "as a permanent arrangement," the agreement was within the statute of frauds, because from its nature and terms it was not to be performed by the company within one year from the making thereof.

In Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502, an agreement by which a father, in consideration of his son's agreeing to work for him upon his farm, without specifying any time for the service, agreed that the value of the work should be paid out of his estate after his death, which did not in fact happen until twenty years after the son ceased work, was not within the statute. Judge Allen, delivering the judgment of the court of appeals, said: "The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute."

In Saunders v. Kastenbine, 6 B. Mon. (Ky.) 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of $400, in monthly instalments of from $4 to $8 each, which would necessarily postpone performance, by either party, beyond the year.

In Arkansas M. R. Co. v. Whitley, 54 Ark. 199, 11 L. R. A. 621, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statue, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year. And a like decision was made in Sweet v. Desha Lumber Co., 56 Ark. 629, upon facts almost exactly like those in the case at bar.

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in Washington, A. & G. Steam Packet Co. v. Sickles, 72 U. S. 5 Wall. 580,

which arose in the District of Columbia under the statute of 29 Car. II, chap. 3, § 4, in force in the state of Maryland and in the District of Columbia. Alexander's British Statutes in Maryland, 509; Ellicott v. Peterson, 4 Md. 476, 487; D. C. Comp. Stat., chap. 23, § 7.

That was an action upon an oral contract by which a steamboat company agreed to attach a patented contrivance, known as the Sickles cut-off, to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay the plaintiffs weekly, for the use of the cut-off, three-fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract, the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson, held the contract to be within the statute, and said: "The substance of the contract is, that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long. * * * It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. Washington, A. & G. Steam Packet Co. v. Sickles, 72 U. S. 5 Wall. 594-596. And reference was made to Birch v. Liverpool, 9 Barn. & C. 392, and Dobson v. Collis, 1 Hurlst. & N. 81, in each of which the agreement was for the hire of a thing, or a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In Washington, A. & G. Steam Packet Co. v. Sickles, it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but was defeasible by an event which might or might not happen within one year. It may well be doubted whether that view can be reconciled within the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the fore part of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." 72 U. S. 5 Wall. 581, 594. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has often been decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1875, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statue, because all this might have been done within a year; and in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the state had agreed to complete by September 1, 1871, was not within the statue, because the contractor, by pushing the work, might have fully completed it before November, 1870. McPherson v. Cox, 96 U. S. 404, 416, 417; Walker v. Johnson, 96 U. S. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the supreme court of the state are in accord with the current of decisions elsewhere.

In Thouvenin v. Lea, 26 Tex. 612, the court said: "An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be performed within a year." In that case, the owner of land orally agreed to sell it for a certain price, payable in five years; the purchaser agreed to go into possession and make improvements; and the seller agreed, if there was a failure to complete the contract, to pay for the improvements. The agreement to pay for the improvements was held not to be within the statute; the court saying: "There is nothing from which it can be inferred that the failure to complete the contract (by reducing it to writing, for instance, as was stipulated should be done), or its abandonment, might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase money, if the contract had been reduced to writing. But appellant might have sold to another, or the contract might have been abandoned by the purchaser, at any time; and upon this alone depended appellant's liability for the improvements." See also, Thomas v. Hammond, 47 Tex. 42.

In the very recent case of Weatherford, M. W. & N. W. R. Co. v. Wood, 88 Tex. 191, 28 L. R. A. 526, it was held that an oral agreement by a railroad company to issue to one Wood annually a pass over its road for himself and his family, and to stop its trains at his house, for ten years, was not within the statute. The court, after reviewing many of the authorities, said: "It seems to be well settled that where there is a contingency, expressed upon the face of the con-

tract or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens. * * * If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening, whether they mention it in the contract or not. The statute only applies to contracts 'not to be performed within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute; and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and his family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. If the agreement had been to give Wood a pass for life, it would, under the above authorities, not have been within the statute; and we can see no good reason for holding it to be within the statute because his right could not have been extended beyond ten years. The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other." 88 Tex. 195, 196, 28 L. R. A. 527, 528.

In the case at bar the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable

interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it;" and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof." * * *

HEATH v. HEATH.

1872. 31 Wis. 223.

CLAIM for one-half of the amount expended by one of the parties in excess of that expended by the other under an oral contract between them to support their mother for the remainder of her life.

COLE, J.— * * * These parties are brothers, and the defendant offered evidence tending to prove that a verbal contract was entered into between them in 1861, by which they agreed to support their mother during her natural life—each one contributing equally thereto —in consideration of the homestead, which she had conveyed to them. It is suggested that such a contract would be void, because, by its terms, it was not to be performed within a year from the making thereof. But this is a mistake. It is apparent that this contract might have been entirely performed within a year consistently with the understanding of the parties, because Mrs. Heath might have died within that time. "When the promise is to continue to do some-

thing until the contingency occur, as for instance to pay during the promissee's life; to pay during the life of another; to board the promissee during his life; to pay the expenses of a child so long as it should be chargeable to the town; to educate a child; to support a child, who is eleven years old, till she is eighteen; to pay during coverture; in all these cases the promise is not affected by the statute, because the party whose life is involved may die within the year." Browne on Frauds (2d ed.), chap. 13, § 276. * * *

CARTER WHITE-LEAD CO v. KINLIN.

1896. 47 Neb. 409, 66 N. W. 536.

IRVINE, C.— * * * The action was by Kinlin against the Carter White-Lead Company, which we shall hereafter term the "Company"; the petition alleging that, on the 23d of November, 1891, a contract had been made between the parties, whereby the company agreed to employ plaintiff, and pay him $2.50 per day while working in the smelting department, and $2 per day while elsewhere employed, and to so give him employment as long as the works were kept running, or until the plaintiff saw fit to quit, in consideration whereof Kinlin agreed to so work for the company, and to release a claim for damages against the company which was then in litigation between them. * * *

A contract, within the meaning of the statute, which is not to be performed within one year from its date, means a contract which, by its terms, discloses that the parties do not contemplate that it can be performed within that period, as, for instance, a contract to employ a party for one year, beginning at a future day. Railroad Co. v. Conlee, 43 Neb. 121, 61 N. W. 111. Where a contract is of such a character that it may be performed within a year, it is not within the statute merely because it may not be performed within that time. Connolly v. Giddings, 24 Neb. 131, 37 N. W. 939; Kiene v. Shaeffing, 33 Neb. 21, 49 N. W. 773; Live Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019. In this case the company might close its works for an indefinite period within a year, or within that time Kinlin might see fit to quit. In either event, the contract would be performed. * * *

DOYLE v. DIXON.

1867. 97 Mass. 208.

ACTION for breach of oral agreement by defendant not to go into the grocer business again at Chicopee for five years.

GRAY, J.—It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters v. Westborough, 19 Pick. (Mass.) 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promissee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill v. Hooper, 1 Gray (Mass.) 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So, if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promissor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon v. King, 11 Met. (Mass.) 411; Worthy v. Jones, 11 Gray (Mass.) 168. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a certain thing for a

certain time may perhaps bind the promisor's representatives, and at any rate it is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds. * * *

WIEBELER v. MILWAUKEE MECHANICS' MUT. INS. CO.

1883. 30 Minn. 464, 16 N. W. 363.

GILFILLAN, C. J.—Action on a contract to insure. From the admissions in the pleadings and on the trial, and from the evidence, the referee was justified in finding, as he did find, that plaintiff held defendant's policy (about to expire) insuring his dwelling for three years for the sum of $250, and that before it expired the agent of defendant, on its behalf, agreed orally with plaintiff to renew it, increasing the amount on the dwelling to $400, and extending it so as to cover the furniture in the amount of $250, and the barn to the amount of $100. Nothing being said to the contrary, the presumption would be that the renewal was to be for the same length of time and the same rate of premium as in the original policy, and the referee found the fact accordingly. This makes a good contract to insure for the term of three years. Defendant claims that the contract was within the statute of frauds and void. There is included in the statute "every agreement that by its terms is not to be performed within one year from the making thereof." This, of course, does not include an agreement that may, in accordance with its terms, be fully performed and ended within the year; as where the thing to be done depends on a contingency that may happen within the time. This is the case with a contract to insure where the insurance is to commence within the year.

Judgment affirmed.

HOLLOWAY v. HAMPTON.

1844. 4 B. Mon. (Ky.) 415.

MARSHALL, J.—This action of assumpsit was brought upon a verbal contract, by which the plaintiff agreed to sell and deliver to the defendant, in good order, at his factory, the plaintiff's crop of hemp, then on hand, as soon as it should be prepared for manufacturing, and to deliver, in like manner, his crops to be raised the

two succeeding years upon same quantity of land which he usually put in hemp; and the defendant agreed to receive the hemp and pay therefor at the rate of six dollars per 112 pounds, but the agreement to cease on the death of either party.

This action is brought for the refusal of the defendant to receive and pay for, at the contract price, the next succeeding crop after the date of the contract. And the only question in the case arises under the last clause of the first section of the statute of frauds, which provides that no action shall be brought upon "any agreement which is not to be performed in the space of one year from the making thereof," unless there be some memorandum of the agreement in writing, etc.

Understanding this clause to refer to such agreements as, according to their terms, are not to be fully performed within one year, the agreement in this case comes clearly within the clause in question, and the action upon it is interdicted by the statute, unless, as is suggested on the part of the plaintiff, the provision that the agreement should cease upon the death of either party, should take the case out of the statute. Why or how it should have this effect has not been intimated, nor do we perceive any possible ground for it. The question is whether, according to the terms of the agreement and the intention of the parties as thereby indicated, the performance is or is not to be within the year. It has been decided that if the time of performance depends, by the contract, on a contingency which may happen within the year, the case is not within this clause of the statute, because, although the contingency may not happen within the year, yet as it may happen within that period, in which case the contract is to be then performed, the agreement cannot be said to be one which is not to be performed within the year. But here the contingency referred to in the contract instead of fixing the time of performance defeats it altogether. The contingency may indeed happen within the year, but if it does it would not bring the time of performance within the year, and therefore can have no tendency to take the contract out of the statute. * * *

KLEEMAN & CO. v. COLLINS.

1872. 9 Bush (Ky.) 460.

PLAINTIFF made a contract in Chicago, Illinois, with the defendants that he would render them one year's service in New Orleans, Louisiana, to commence when the plaintiff should arrive at New Orleans. The plaintiff rendered four months' service in pursuance of said contract and was then discharged by the defendants. * * *

PRYOR, J.— * * * One of the reasons for the enactment of this

statute was to prevent proof of contracts by parol evidence at a remote period from the time such contracts were made, and we know of no exception in its application where the contract is in parol and cannot be performed within a year. A contract made for the services of another for one year, the term of service to commence five days from the date of the contract, is as much within the statute as if the parol agreement had been made five years prior to the time at which the services were to begin.

In the case of Kelly v. Terrell's Adm'r (26 Ga. 552), the defendants had employed the plaintiff, in the Christmas of 1854, as their overseer for the year of 1855; held that the contract, being in parol, was within the statute. Lord Ellenborough, in the case of Bracegirdle v. Heald (1 B. & A. 722), said, "If we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for, in point of reason, an excess of twenty years will equally not be within the act." In the case of Emory v. Smith (46 N. H. 157) a parol contract was made, by which the plaintiff was to labor for the defendant for two years, at $100 for the first year, and $200 for the second year. An action was brought to recover the balance due on the last year's work, and it was adjudged that the case was within the statute, and no recovery could be had on the contract.

The authorities on this point are conclusive. A contract for a year's service, to commence some days hence, must be in writing. (Bracegirdle v. Heald, 1 B. & A. 722; Peter v. Compton, 1 Smith's Leading Cases 144; Drummond v. Burrell, 13 Wend. (N. Y.) 307; Holloway v. Hampton, 4 B. Mon. (Ky.) 415; Davenport v. Gentry's Adm'r, 9 B. Mon. (Ky.) 428.) "The statute applies to a contract for a year's service, to commence at a subsequent day." (1 Hilliard on Cont. 416.)

Nor does a partial performance authorize an action to be maintained on the contract. The only remedy the party has is by a *quantum meruit*, or some appropriate action other than on the contract itself. (Lane v. Shackleford, 5 N. H. 130; Pierce v. Paine, 28 Vt. 34; Herron v. Butler, 20 Me. 119.) * * *

DRUMMOND v. BURRELL.

1835. 13 Wend. (N. Y.) 307.

A PARTY contracted by parol to work for another for the term of two years, for which he was to receive $100 or $50 a year. He quit the service at the end of six months. Whether the contract was within the statute was the only question.

SAVAGE, C. J.— * * * The defendant agrees to work two years from the date of the agreement for the plaintiffs, and they agree to pay him $100. When was the agreement to be performed? The defendant was to occupy two years in performing his part of the agreement; of course he could not perform within one year. When were the plaintiffs to pay the $100? On this point the contract is silent in terms, but as the payment is to be made in consideration of the services, those services are a condition precedent to the payment, and must be performed in full, before payment can be enforced. The money then was to be paid at the end of two years, and of course not within one year. The contract then, by its terms, was not to be performed within one year. This view of the case is supported by several adjudged cases. In Boydell v. Drummond, 11 East 155, it was held that an inchoate performance was not sufficient; that the word "performed," *ex vi termini,* means complete performance or consummation of the work, and that part performance could not be called performance. In Shute v. Dorr, 5 Wend. (N. Y.) 204, the plaintiff put his son, 16 years of age, to live with the defendant, until he arrived at the age of 21, when the defendant was to pay the son $100. The son continued more than three years with the defendant and then left him, and the plaintiff, the father, brought his suit. The contract was held to be clearly void; the service was to be five years, and the payment at the expiration of the term; there was no contingency upon which it could have been performed within one year; and being by parol, it was void. I cannot distinguish this case in principle from that of Shute v. Dorr. The only difference is that in that case the contract was to be completely performed at the end of five years; this was to be completed in two years. * * *

McELROY v. LUDLUM ET AL.

1880. 32 N. J. Eq. 828.

DEPUE, J.— * * * The suit is in substance an action to enforce a legal demand. It must, therefore, be decided upon the legal principles by which the right of a party to recover compensation for services rendered, under a contract invalid by the statue of frauds, is determined. Performance of a contract invalid by the statute, will not validate the contract so as to enable a party to enforce it by an action upon the contract. Unless in cases specially provided for in the statute, part performance will not validate the contract at law. The dictum that part performance will make valid a contract invalid by the statute of frauds, is exclusively the creature of equity, and applies only to contracts relating to lands, and does not extend to contracts relating to other matters. Birckhead v. Cummins, 4 Vr. 44, 50; Brittain v. Rossiter, 18 Am. Law Reg. (N. S.) 716. The only

remedy in such cases is by an action on a *quantum meruit* to recover the value of the services. * * * At present, the law is settled that in an action for services performed under a contract invalid by the statute, the plaintiff cannot sue upon the contract; he can only seek his remedy upon a *quantum meruit* for the value of the services rendered. Smith v. Smith's Adm'rs, 4 Dutch. (N. J.) 208; Rutan v. Hinchman, 1 Vr. 255. * * *

An agreement for a lease for a year, to commence at a future time, is held in some of the states to be within and in others to be without this clause of the statute. See Benjamin, Principles of Contract, 111.

In some of the states it is held and in others denied that the statute applies to contracts where one of the parties is to perform, and does perform, immediately or within a year, and the other is not to perform within the year. In nearly all the cases, however, where it is denied that the statute applies, the facts were that everything that was to be done under the contract was to be done within the year, except the payment of money. See Benjamin, Principles of Contract, 111.

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§ 31 (A)—Contract for the Sale of Land or an Interest Therein.

A contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, is within the statute, and such contract, if made by an agent of the party sought to be charged, is not enforceable at law, unless the authority of the agent is in writing signed by such party.

This is the rule in Illinois and several of the states. See Rev. St. Ill. ch. 59, § 2. In a few of them the term is three years, and in some the authority of the agent for this purpose need not be in writing.

The words "lands, tenements, and hereditaments" are used in contradistinction to the words "goods and chattels." They denote the subjects of Real as distinguished from Personal Property.

Growing crops, the product of annual planting and cultivation, such as grain and vegetables,—being raised by the industry of man (*fructus industriales*),—are regarded for most purposes as chattel interests, and a contract for the sale of any such crop is accordingly held to be a sale of goods, and not within this provision of the statute. See Benjamin, Principles of Contract, p. 112.

BULL v. GRISWOLD.

1858. 19 Ill. 631.

ACTION for trespasses to real estate with counts for cutting and carrying away unthreshed wheat.

CATON, C. J.— * * * The principal questions in the case arise on the instructions. * * * The first asserts the proposition that growing crops are so far personal property, that they may be sold and transferred by parol, and such is undoubtedly the well-settled principle of law. They partake of realty, no doubt, so far as to pass by a deed of the land as incident to it, and so it is with many other articles, which are well settled to be personal property, as fixtures of trade, or machinery erected for mechanical purposes. It has long been settled beyond controversy, that a constable may seize upon and sell growing crops, to satisfy an execution issued by a justice of the peace, and this only upon the ground that they are personal property. If this wheat was sold by parol, by the defendant to the plaintiff, that vested in him a good title, and the possession also, until it was time to harvest it, because the law could not require him to take manual possession of it till that time. To have done so, would have destroyed it.

The second instruction quoted, requires no comment. It merely repeats what the (Illinois) statute asserts, that a parol lease of land for one year or a shorter term, is valid. * * *

As to the natural products of the soil, which grow spontaneously without yearly cultivation (*fructus naturales*), most of the American cases are in accord with the following propositions:

Such natural growths of the soil as grass and trees, while growing or standing, are part of the realty, and a contract for the sale of any such growth by the owner of the freehold, which contemplates the passing of the property therein before it is severed from the soil, is treated as a contract for the sale of an interest in land, and is accordingly held to be within this provision of the statute. See Benjamin, Principles of Contract, p. 114.

HIRTH v. GRAHAM.

1893. 50 Ohio St. 57, 33 N. E. 90.

BRADBURY, J.—The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. * * *

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much-controverted subject in the courts of England, as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth, 6 East 602, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying "Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,) "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." *Id.* 610. Afterwards, in Teal v. Auty, 2 Brod. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in Marshall v. Green, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the

three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales, § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claflin v. Carpenter, 4 Met. (Mass.) 580; Nettleton v. Sikes, 8 Met. (Mass.) 34; Bostwick v. Leach, 3 Day (Conn.) 476; Erskine v. Plummer, 7 Me. 447; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, 13 B. Mon. (Ky.) 340; Byassee v. Reese, 4 Metc. (Ky.) 372; Smith v. Bryan, 5 Md. 141. In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. (Ky.) 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (Marshall v. Green, 1 C. P. Div. 35), the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts (Giles v. Simonds, 15 Gray (Mass.) 441), holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 1 Denio (N. Y.) 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans, 44 Mich. 510, 7 N. W. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430; Bowers v. Bowers, 95 Pa. St. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62

Wis. 198, 22 N. W. 467; Knox v. Haralson, 2 Tenn. Ch. 232. The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendee with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight, in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered.

DOUGHERTY v. CATLETT.

1889. 129 Ill. 431, 21 N. E. 932.

BAILEY, J.—The only questions presented by this appeal are those arising upon the plea of the statute of frauds. It appears from the declaration that, prior to the date of the contract upon which the suit is brought, the plaintiff and defendant entered into an agreement in writing, by which the defendant, in consideration of a certain sum of money then paid to him by the plaintiff, and of certain other payments thereafter to be made, agreed to convey to the plaintiff certain lands in Vermilion county; that the plaintiff thereupon entered into possession of said lands; that while so in possession he sold an undivided half of the lands to one McCabe, the defendant conveying said undivided half to McCabe at the plaintiff's request; that after such conveyance was made and while the plaintiff was still in possession of the remaining undivided half, the plaintiff and defendant entered into a verbal agreement whereby the plaintiff agreed to sell and surrender to the defendant said undivided half still in his possession, the defendant agreeing, in consideration there-

of, to pay the plaintiff the sum of $3,500; that the plaintiff thereupon surrendered to the defendant the possession of said undivided half of said premises, and that the defendant retained the same in his possession, and afterwards sold and conveyed it to a third person, with the plaintiff's knowledge, for the sum of $4,000. The suit is brought to recover of the defendant the consideration of said verbal agreement.

The second section of the statute of frauds of which the defendant seeks by his plea to avail himself is as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorized in writing signed by such party."

The execution by the defendant to the plaintiff of the written contract of sale alleged in the declaration vested in the plaintiff an equitable interest in the lands therein described, and there can be no doubt that such interest was an interest in or concerning lands within the meaning of said statute. That the statute of frauds embraces equitable as well as legal interests in land is well settled. Browne on Statute of Frauds, § 229. As said by Mr. Justice Story in Smith v. Burnham, 3 Sumner 435, "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third party, or otherwise, is clearly a sale of an interest in lands, within the statute of frauds." See also Richards v. Richards, 9 Gray (Mass.) 313; Hughes v. Moore, 7 Cranch (U. S.) 176; Simms v. Killian, 12 Ired. (N. Car.) 252; Dial v. Crain, 10 Tex. 444; Catlett v. Dougherty, 21 Ill. App. 116; Jevne v. Osgood, 57 Ill. 340.

The plaintiff contends that the acts performed by him under his oral contract to sell and surrender his interest in said lands to the defendant constitute such a performance as should take the case out of the statute. The only act of performance alleged in the declaration is the delivery of possesion of the premises sold to the defendant. There is no allegation of any cancellation or surrender of the defendant's contract to convey the lands to the plaintiff on payment of the purchase money, nor is the cancellation of said contract averred, either directly or inferentially. It will therefore be presumed that said contract is still held by the plaintiff as a valid and subsisting legal obligation against the defendant. The averments of the declaration, therefore, as we interpret them show a partial and not a complete performance.

The doctrine of part performance is a doctrine of equity and does not prevail at law. Mr. Browne, in his Treatise on the Statute of

Frauds, § 451, says: "It is settled by a long series of authorities, that a part execution of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions," and in support of this statement a large number of cases are cited in a note. To same effect see 2 Reed on the Statute of Frauds, § 548, and authorities cited in note. The same rule has been frequently announced by this court. Warner v. Hale, 65 Ill. 395; Wheeler v. Frankenthal, 78 *id.* 124; Creighten v. Sanders, 89 *id.* 543.

The plaintiff's contention is, that the facts averred in the declaration amount to a rescission of the defendant's contract to convey, and that such rescission, coupled with a delivery of possession, should be held to be tantamount to a complete performance. The difficulty with this view is that no rescission is averred, either directly or inferentially. The only averment is that the plaintiff had surrendered the possession to the defendant who already had the legal title, and that the defendant subsequently conveyed the land, with the plaintiff's knowledge, to a third person. A surrender of possession did not necessarily involve a rescission of the defendant's contract, since such surrender of possession may be entirely consistent with an intention on his part to retain the defendant's contract with a view of subsequently enforcing it against him. The pleading must be construed most strongly against the pleader and as the declaration contains no averment of a rescission or of any facts from which a rescission must be necessarily implied, it must be presumed that none was made or intended. If the plaintiff relied on the theory of a rescission he should have averred it, and not having done so, he cannot recover upon a theory not supported by his declaration.

We are unable to see that any special force is to be given, in this connection, to the averment that the defendant had conveyed the land to a third person with the plaintiff's knowledge. It might perhaps have been different if such conveyance had been made with the plaintiff's consent and approbation. The legal effect of the conveyance, so long as it does not appear to have been made with the plaintiff's consent, is merely to place it out of the defendant's power to perform his contract to convey the land to the plaintiff, but it has no tendency to work a rescission or cancellation of the contract, or to absolve the defendant from his liability thereon, and this is in no way affected by the mere knowledge of the plaintiff that the conveyance was being made. We are of the opinion that the demurrer to the defendant's plea was properly overruled. The judgment of the appellate court will therefore be affirmed.

Judgment affirmed.

FORBES v. BALENSEIFER.

1874. 74 Ill. 183.

WALKER, C. J.—Appellant brought an action of trespass, before a justice of the peace, against appellee, to recover for injury to and destruction of his corn by appellee's hogs and cattle. A trial was had before the justice, when appellant recovered a judgment for $150 and costs. The case was removed by appeal to the circuit court, where another trial was had by the court and a jury, which resulted in a verdict and judgment in favor of the defendant, and plaintiff brings the case by appeal to this court.

It appears that the owners of four several tracts of adjoining lands, some three or four years previous to the trial, agreed that in fencing these lands each would leave out a rod of ground in width along the dividing line between them, so as to form a lane two rods in width between their farms, from the north to the south side, where this lane intersected at right angles with a public highway. The fences were so built, and it was understood that the lane was to be for the benefit of each proprietor. Subsequently one of the owners sold his farm to appellant, without, so far as we can see from the record, making any reservation. This agreement was never reduced to writing, but only existed in parol, and seems not to have intended the lane as a public highway, but simply as a pass-way for the owners of these lands.

After appellant purchased one of the tracts he closed the lane, by erecting gates, as he claims, with the consent of appellee, but the latter denies that he ever gave consent. It appears that appellee has to pass over a strip of appellant's land to reach this lane, and that appellant forbade appellee's crossing over this strip, but he disregarded the prohibition and subsequently passed over it repeatedly to get out at the lane, and appellant claims that he left the gate open and the fence down, by which the stock got in and destroyed his corn. The court, against the objections of appellant, permitted appellee to prove the declarations of appellant's grantor, to show this was a private way, which appellee was entitled to use as such, and this is assigned as error.

An easement, being connected with an appurtenant to real estate, so far partakes of the character of lands that it can only be acquired by grant, or prescription, which implies a previous grant. Washburn on Easements, 23. It then follows that this evidence was incompetent to prove appellee had a right of way over appellant's land, as that could only be done by deed, or such long and uninterrupted use as the law would imply a grant, neither of which is claimed in this case. But any verbal agreement which appellant's grantor may have made with appellee for passing over his land could give appellant no vested right of way.

It at most would amount to a mere license, and such a license is revocable at the pleasure of the licensor; and a revocation may be made in different modes. It may be done by express notice, by such acts as are entirely inconsistent with the enjoyment of the license, as, by obstructing the land licensed to be used, by appropriating it to any use inconsistent with the enjoyment of the license, or by sale of the land without reserving the privilege to the licensee. In all such cases of revocation the licensee's rights are terminated. A license, unlike an easement, is not an interest in the land, but only a privilege to go upon the land for a specified purpose, but is revocable at the will of the owner, whilst an easement is irrevocable. Wash. on Eas., id. * * *

By the sixth of appellee's instructions the jury are informed that if they believe that the former owners of the land laid out the road before the acts complained of had been committed, and worked and traveled it amongst themselves as a highway, that would amount to a license to each owner to so use it unless revoked by the owners of the land, and that neither of such owners, nor his grantee, could commit a trespass against any of the other owners or their grantees, by passing over it, nor by the removal of obstructions to free travel therein, till the license was revoked. This instruction was vicious, because it announced an incorrect rule of law, and as framed the jury could only consider whether all of the owners or part of them and the grantees of the others had united in revoking the license. We are aware of no principle of law which requires all the parties to a mutual license to join in its revocation. A verbal license is no more out of the statute of frauds because it is mutual among several than when it is simply made from one person to another. A verbal agreement between four persons that each shall have a license to pass over a designated portion of the land of each, is within the statute of frauds equally with any other such license. The statute had made no exceptions on account of numbers, and no reason is perceived why it should. Under such a verbal license or agreement either, any, or all of the parties would have the same right to revoke a license as would the licensor to revoke such privileges to a single person. They both stand upon and are governed by the same rule. This instruction was manifestly wrong, as there was no pretense that all of these persons joined in a revocation, and as they did not, this instruction ended the case.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

In some of the states (among them Pennsylvania, Ohio, Indiana, Iowa and Vermont), if the license has been acted upon and considerable expense thereby incurred, equity will not permit it to be revoked. See Benjamin, Principles of Contract, p. 119.

JOHNSON ET AL. v. WILKINSON.

1885. 139 Mass. 3, 29 N. E. 62.

MORTON, C. J.—There was evidence tending to show that the defendant, who was the owner of a hall, entered into an oral contract with the plaintiffs by which he agreed to permit the plaintiffs to use the hall for dancing parties on the afternoons of four holidays (Thanksgiving, Christmas, Washington's Birthday and Fast-Day) at a stipulated price for each afternoon. The superior court directed a verdict for the defendant, upon the ground that this contract was within the statute of frauds, being a contract for the sale of an interest in land. Pub. St., c. 78, § 1, cl. 4. The question is whether it was such a contract, or merely a contract for a license to the plaintiffs to enter and use the hall for the purpose contemplated. A license is a permission or authority to enter the land and do certain acts or series of acts, the parties not intending to convey any interest in the land; and it is well settled that such a license need not be in writing, under the statute of frauds. Thus a license to enter land and to cut timber, or to gather the growing crops, is valid, though not in writing. Whitmarsh v. Walker, 1 Met. (Mass.) 313. So an agreement for a seat in a theater, or other place of amusement, is a license merely. McCrea v. Marsh, 12 Gray (Mass.) 211; Burton v. Scherpf, 1 Allen (Mass.) 133. So, ordinarily, an agreement for lodgings in a hotel or boarding-house, though the rooms the boarder is to occupy are designated, does not create an interest in land, but is merely a license. White v. Maynard, 111 Mass. 250. In the case before us it seems to us that the contract has the elements of a license, rather than of a contract for the sale of any interest in land. The use of the hall by the plaintiffs was not to be continuous, but only occasional, and for a few hours on four separate days. They were not to have the exclusive occupation and control of it. The key was never delivered to them, but remained with the defendant, who, on the afternoons it was occupied under the contract, opened, lighted, and closed it. We think the defendant would remain all the time in the legal possession of the land; that the plaintiffs were to occupy it merely as licensees, and would acquire under the contract no interest in the land. It is like the ordinary case of hiring a hall for a night, which does not create a lease, but the hirer occupies under a license. Regarding the contract in this case as a contract for a license, it is true that the defendant had the power to revoke the license, and the plaintiffs could not compel the defendant to give them the use of the hall; but if, in revoking it, the defendant violated his contract, he is responsible for any damages sustained by the plaintiffs by reason of such breach of contract. McCrea v. Marsh, and Whitmarsh v. Walker, *ubi supra.*

Judgment for the plaintiffs.

HALL ET AL. v. SOLOMON.

1892. 61 Conn. 476, 23 Atl. 876.

ACTION of Thomas S. Hall and others against defendant to restrain him from using his premises or allowing them to be used for a liquor saloon or for the sale of intoxicants, in violation of his parol agreement made as part of the consideration of the sale of the premises to him. Permanent injunction issued. Appeal.

CARPENTER, J.— * * * The seventh, eighth and ninth reasons of appeal relate to the statute of frauds. The language of the statute is, "or upon any agreement for the sale of real estate, or any interest in or concerning it."

Counsel for the defendant do not, in their reasons of appeal or in their brief, bring the case quite within the language of the statute. They contend that it is an agreement for an interest in or concerning real estate. An agreement for the sale of an interest in or an interest concerning real estate contemplates a transfer of some portion of the title. An agreement not to carry on a particular kind of business on certain premises is not an agreement for the sale of an interest in or concerning said premises. In 1809 this court said: "The agreement not to use his mill after a certain day is not within the statute of frauds and perjuries; for this statute contemplates only a transfer of lands, or some interest in them." Bostwick v. Leach, 3 Day (Conn.) 476. That is as sound law to-day as it was eighty years ago. See, also, 8 Amer. & Eng. Enc. Law, pp. 701–703. * * *

There is no error.

HAVILAND v. SAMMIS.

1892. 62 Conn. 44, 25 Atl. 394.

ANDREWS, C. J.—The complaint alleges, in substance, that on the 26th day of June, 1888, the defendants were the owners of a tract of land on West avenue, in the city of Norwalk, which they represented to the plaintiff to be 110 feet wide; that the plaintiff, relying on their representation, agreed to buy the land, and made on that day a part payment of the purchase money, and on the 29th day of the same month paid the balance of the purchase price to the defendants; that thereafter the defendants tendered to the plaintiff a deed, which described the land to be 110 feet, more or less, wide on West avenue, and 89 feet wide in the rear. Apparently the plaintiff refused to accept the deed, for the complaint avers "that the said defendants, by their said agent, agreed by parol with the plaintiff, through her said agent, that if she would accept said deed they would pay her the difference between the value of the tract described in

the deed and the value of the tract as represented by them, and that the plaintiff, under this agreement, accepted said deed." The complaint alleges the difference in the value to be $750, and that the defendants have refused to pay it. The plaintiff claims damages to the amount of $800. The defendants demur to the complaint, "because it appears from the allegations thereof that the agreement upon which the plaintiff seeks to maintain her action, if any such was made, was for the sale of real estate, or an interest in or concerning it, and was by parol, and not in writing, as required by the statute of frauds." The proposition of law maintained by the defendants, "that when an entire and indivisible contract is partially within the statute of frauds, the whole is avoided by the statute if that part is by parol," is undoubtedly correct. But this case is not affected by that proposition. The defendants had contracted to convey to the plaintiff a certain piece of land, for which she had paid them. They proposed to convey a smaller piece. She refused to accept it. They then say to her: "If you will accept the deed of the smaller piece, we will return to you the difference in value between the piece of land we agreed to convey to you and the piece of land which in fact we do convey to you." The promise to return the excess of money is not affected by any sale of land.

Analyze the transaction between these parties more minutely, and this becomes clear. The defendants had had negotiations with the plaintiff by which they had contracted to convey to her a certain piece of land, for which she had paid them. They tender her a deed of a smaller piece, which she refuses to accept. At that moment all contract for the sale of that piece of land is at an end. Then the parties begin to negotiate for the sale by the defendants to the plaintiff of a different piece of land,—a smaller piece. The plaintiff consents to take a smaller piece at a smaller price. This is a new contract. A deed is given and accepted. The price had been paid. All contracts respecting land or any interest in or concerning land between these parties were then concluded,—executed on both sides. But the money representing the difference in price between the piece of land agreed by the first negotiation to be conveyed and the price of the land actually conveyed remained in the hands of the defendants. They had promised to return it to the plaintiff. They have not done so. This action is brought to recover it. "The statute of frauds does not apply to such an action, whether brought on an implied or upon an express agreement. The obligation to repay the money advanced by the plaintiff is independent of the character of the consideration upon which the advance was made. And if an express promise to that effect be separable from the principal agreement to which it is an incident, it may be enforced, although the principal agreement might be avoided. The fact that a certain stipulation is made at the same time, and forms a part of an arrangement for the sale of an interest in land, does not prevent an action from being

maintained upon it: provided—First, that the action does not tend to enforce the sale or purchase of the interest in land; and, second, that in other respects the stipulation is susceptible of being separately enforced by action. Such stipulations, collateral to the sale, but contained in the same contract, have been repeatedly enforced." Wetherbee v. Potter, 99 Mass. 354, 361; Wilkinson v. Scott, 17 Mass. 258; Hall v. Solomon, 61 Conn. 476, 23 Atl. 876. The court of common pleas is advised to overrule the demurrer.

DE BEERSKI v. PAIGE.

1867. 36 N. Y. 537.

DAVIES, C. J.— * * * It is well settled if part of one entire contract be void under the statute of frauds, the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part, the other being void. Chatu v. Becket, 7 Turn. (Ark.) 197; Crawford v. Morrell, 8 Johns. (N. Y.) 253; Van Alstyne v. Wimple, 4 Cow. (N. Y.) 547; Mackie v. Cairns, *id.* 548, 15 Am. Dec. 477; Thayer v. Rock, 13 Wend. (N. Y.) 53. * * * .

In Thayer v. Rock, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well in respect to the personal as to the real property. Chief Justice Savage, says: "The action in this case was brought to enforce that part of the contract which, if it had stood alone, would have been good, but being part of an entire contract, embracing another subject, in respect to which it was void, the whole was void. The contract was to sell the mill site and privileges, and, also, the wood and timber, and was an entire contract, entered into for one and the same consideration, the two subjects cannot be separated, and being void in part is totally void." And the chief justice illustrates the principle of the decision in this manner: "so of the case put by counsel in argument: A sells to B an acre of land, and a pair of horses for $500, all by one entire parol contract; the horses are delivered and the money paid. The counsel says the title to the horses passes. Not so, I apprehend, for the contract as to the land being void, the whole is void. A may reclaim his horses or their value, and B may recover back his $500." * * *

HOWARD v. BROWER.

1881. 37 Ohio St. 402.

WHITE, J.— * * * The contract sued on, and which the plaintiff avers he accepted and performed, is thus described in the petition:

"The plaintiff further says, that after he came of age, the said John Kugler stated to the plaintiff, that he could not do without his services in his large business; and that, if the plaintiff would continue with him in his business, he would pay plaintiff a reasonable salary from year to year, and would also provide for plaintiff liberally out of his estate, by his last will and testament, at least to the amount of ten thousand dollars, *either in real estate or money.*"

Browne, in his work on the Statute of Frauds, in speaking of contracts in which a party promises to do one of two or more things, the statute applying to one of the alternative engagements, but not to the others, uses this language: "It is manifest that of such alternative engagements, no action will lie upon that one, which if it stood alone, could be enforced as being clear of the statute of frauds, because the effect would be to enforce the other, namely, by making the violation of it the ground of an action." Browne on the Statute of Frauds, § 152. And in Patterson v. Cunningham it is laid down that a promise, being in the alternative, to pay money or convey lands, does not exempt it from the operation of the statute. 12 Me. 506. See also, Crawford v. Morrell, 8 Johns. (N. Y.) 253; Van Alstine v. Wimple, 5 Cow. (N. Y.) 162; Goodrich v. Nichols, 2 Root (Conn.) 498; Agnew on Statute of Frauds, 86; Leake's Dig. of the Law of Contracts, 675; Savage v. Canning, 1 I. R. C. L. 434; Fuller v. Reed, 38 Cal. 99.

The principle of the rule is that where the contract is entire, no one part being severable from the rest, and part of it is within the statute, the other part cannot be enforced.

The breach alleged in the petition is that Kugler, the intestate, did not in his lifetime provide for the plaintiff the sum of $10,000 in money or real estate, or any part thereof. To constitute a cause of action on the agreement it was necessary to aver a breach of both alternatives of the promise; and as under the statute there could be no breach of the promise in respect to the land, there could be no cause of action on the promise in respect to the money. * * *

HEYN v. PHILIPS.

1869. 37 Cal. 529.

ACTION to recover $4,000 for the service rendered in finding a purchaser of the defendant's land. The proof showed that the contract between the plaintiff and defendant was in parol. Judgment for defendant. Appeal.

SAWYER, C. J.—The question in this case is, whether the contract sued on and proved is a contract "for the sale of any lands, or interest in lands," within the meaning of the eighth section of the statute of frauds, and which is required to be in writing, and subscribed by the party to be charged.

The contract alleged is, that defendant employed said plaintiff to negotiate a sale of certain described lands, and find a purchaser for the same; that it was "stipulated and agreed by and between said defendant and said plaintiff, that if said plaintiff would and should, within ten days from said last named day, find a purchaser or purchasers for said land, at the price of $200 per acre, that the said defendant would sell and convey the same for that sum to such purchaser or purchasers, and that said plaintiff might and should have for his services in making such negotiation and finding a purchaser or purchasers, all that might or could be obtained from such purchaser or purchasers over said sum of $200 per acre;" that plaintiff found a purchaser at that sum and $4,000 over; that said purchaser tendered the money to defendant and demanded a conveyance, and that said defendant refused to receive said sum, or make a conveyance, whereby plaintiff was prevented from receiving the said excess of $4,000 as compensation for his services.

It does not appear to us that this is a contract for the sale of land, or an interest in land, within the meaning of the statute of frauds. It was a mere contract of employment between the plaintiff and defendant. There was no sale of land from the defendant to the plaintiff. The plaintiff was simply employed to find a purchaser for defendant's land at a given price to be realized by defendant, and the compensation to be received by plaintiff was to be such sum as he could get for the land over the given price. It is true that defendant agreed that in case a purchaser should be found willing to pay the given price or a larger sum, he would convey to such purchaser upon the receipt of the money so as to enable plaintiff to realize the compensation, and he did not agree to pay anything himself, but this was still but a mode of ascertaining and obtaining a compensation for plaintiff's services. The plaintiff had no interest, and was to have no interest whatever in the land, *as such*. The contract was substantially one of employment to find a purchaser of land, and not as between the parties a sale or agreement to sell land, or any interest in land. The subject-matter of the contract was the business of finding a party who

would purchase the land for a given price and such sum over as would compensate the plaintiff for his services. He found a purchaser, and he was prevented from receiving his compensation by the refusal of the defendant to enter into the contract of sale with the purchaser found by plaintiff.

We think the judgment and order denying a new trial should be reversed and a new trial had, and it is so ordered.

SPEYER v. DESJARDINS ET AL.

1892. 144 Ill. 641, 32 N. E. 283.

BILL in chancery for an accounting, where two persons by a parol contract entered into a co-partnership for the purpose of buying and selling lands at a profit. Demurrer sustained and bill dismissed. Appeal.

BAKER, J.— * * * The theory of the bill is that there is a partnership between appellant and Desjardins, and that the lots and the buildings erected thereon are partnership property; and the claim of appellant is that the statute of frauds has no application to such a case.

It is well settled that an oral contract by two or more persons to purchase real estate for their joint benefit is within the statute. But it has been a mooted question whether a partnership can be created by parol for the purpose of buying and selling lands for profit. There is a very considerable conflict in the cases upon that question, but the decided weight of authority seems to have answered it in the affirmative. That an agreement for a partnership, for the purpose of dealing and trading in lands for profit, is not within the statute, and that the fact of the existence of the partnership, and the extent of each party's interest, may be shown by parol is now quite generally accepted as the established doctrine. Dale v. Hamilton, 5 Hare 369; Essex v. Essex, 20 Beav. 449; Holman v. McCrary, 51 Ind. 358; Richards v. Grinnell, 63 Iowa 44; Chester v. Dickerson, 54 N. Y. 1; Black v. Black, 15 Ga. 449; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Bunnel v. Tainter, 4 Conn. 568; Pennybacker v. Leary, 65 Iowa 220; Gibbons v. Bell, 45 Tex. 417; Perronett v. Pyme, 34 N. J. Eq. 26.

It is useless to restate the arguments pro and con bearing on the point under consideration; and it is hardly probable that we could now make any suggestion that has not already been fully considered. The leading and more important cases are discussed or referred to in Browne on the Statute of Frauds (4th ed.), § 259 *et seq.* and notes, and are also cited in notes to pages 700 to 704 of Vol. 8 of Am. & Eng. Ency. Law.

The cases we have cited, and many others, proceed upon the theory that the real estate of a partnership is treated and administered in equity, as between partners and for all the purposes of the partnership, as personal property and partnership assets. From its status in equity, of being stock in trade and partnership assets, it is readily deducible that it is immaterial whether the legal title to the partnership land is in all the partners, or in one, or in some number less than the whole; that it is not material whether the partnership was already established and engaged in its business when the land was acquired and brought into the partnership stock, or whether the partnership was established and the land acquired and put in contemporaneously, or whether the partnership was established for the express and special purpose of dealing in and making profit out of the very land itself which is in question; and that the facts of the existence of the partnership, and that the lands were acquired and used for partnership purposes, being shown by parol, it is immaterial whether such partnership was formed by written articles or by parol. Browne's Stat. Frauds, § 261a.

The doctrine of the cases we have cited, so far as it involves the provisions of the statute of frauds, seems to proceed upon the ground of a trust implied from the relation of co-partnership.

The matter here at issue is a close question and beset with difficulties whichever view is taken. It seems difficult to demonstrate, to a certainty, that the doctrine above stated should prevail and take partnership agreements and partnership property out of the statute, and equally difficult to satisfactorily demonstrate that such agreements are within the statute, as held in Smith v. Burnham, 3 Sum. (U. S.) 437; Bird v. Morrison, 12 Wis. 138, and other cases. Upon the whole, we are inclined to follow the view which seems to obtain in England and in most of the states of the Union, that partnership agreements and partnership lands, as between the partners and for all partnership purposes, are not within the statute.

The bill in the case at bar shows that the parties agreed to purchase the five lots and erect buildings thereon, each party contributing one-half of the money necessary for the enterprise, the lots and buildings then to be sold, and the profit or loss arising from the enterprise to be divided equally between them. This was manifestly a partnership agreement. The bill then shows that the parties purchased the lots "in pursuance of the agreement," and that, at the same time and as a part of the same transaction, money was raised by placing mortgages on the lots and the purchase price of the lots paid with such money. Whose money, then, was it that was applied in payment of the lots? It is admitted that, by the terms of the partnership agreement, all liabilities that the partners, or either of them, should create in furtherance of the enterprise, were to be, as between the partners, treated and considered as joint liabilities to be met and shared by them in equal shares. This would seem to stamp the money that was

received on the mortgages and paid on the lots as partnership money. Since, then, the money, by force of the agreement, was partnership money it follows that, when $3,750 of it was, at the time of the purchase, paid as the purchase money of the lots, a resulting trust at once arose by operation of law, out of the transaction, in favor of the partnership. See Wallace v. Carpenter, 85 Ill. 590.

Our conclusion, therefore, is that, without regard to the question whether or not the partnership agreement mentioned in the bill of complaint was in writing, a proper case for the interposition of a court of chancery was stated in the bill, and it was error to sustain the demurrer and dismiss said bill.

The decree is reversed, and the cause is remanded with directions to overrule the demurrer.

GOLDSTEIN v. NATHAN.

1895. 158 Ill. 641, 42 N. E. 72.

BILL in chancery for an accounting where two separate owners of real estate, purchased by their separate funds, entered into a co-partnership with reference to the sale thereof, by a parol contract. Demurrer sustained and bill dismissed. Appeal.

PHILLIPS, J.— * * * It is true that a partnership may exist for the purpose of dealing in lands for profit, and the existence of such partnership, and the extent of the interest of the respective partners, may be shown by parol. (Speyer v. Desjardins, 144 Ill. 641; Traphagen v. Burt, 67 N. Y. 30; Chester v. Dickinson, 54 *id.* 1; Getty v. Devlin, *id.* 403.) There is a wide distinction, however, in an agreement for one to become interested in the profits of certain land already purchased and owned by another, and an agreement to share in the benefits to be derived from lands to be thereafter acquired. Where lands are purchased by a partnership and paid for with the moneys thereof, or acquired as partnership property in the usual course of business of such partnership, a court of equity may treat such real estate as partnership funds, and, as a consequence, as personal property. This rule grows out of the nature of the partnership relation, and is rendered necessary for the purpose of doing justice between the parties, or between the firm and others doing business and having dealings therewith. (Black v. Black, 15 Ga. 445.) In this case, the land was not purchased by appellant in the name of appellee and the purchase money furnished by appellant. It is not a case of a purchase of lands paid for out of partnership funds and a deed taken to appellee. No partnership funds existed. There was therefore no resulting trust in appellant, and whatever interest he is alleged by the bill to have acquired was by virtue of his contract. The lot was owned by appellee at the time of the contract and

paid for by his money, and any interest in the land or the proceeds growing out of the alleged contract cannot be severed and made to apply to the profits as distinct from the land itself. If the appellant acquired an interest in appellee's lot by virtue of his contract, it attached upon the contract being made. If such interest attached and the land had not been sold, the appellant would have been entitled to his moiety therein. Had appellee died before sale, and appellant had an interest in the lot, he would have the right to sell and wind up the partnership affairs. It is only by having acquired an interest in the lot that he could have acquired an interest in the proceeds of the sale. We hold, that where two separate owners of real estate, purchased by their separate funds, enter into a co-partnership with reference to a sale thereof, by a parol contract, such contract is within the statute of frauds. McCormick's Appeal, 57 Pa. St. 54; Vose v. Strong, 144 Ill. 108; Smith v. Burnham, 3 Sum. (U. S.) 435.

We hold that the averments of the bill setting forth the purchase price and selling price of the lots, and that the net profits derived from the sale were to be participated in by the parties, are sufficiently definite averments to authorize a finding by an interlocutory decree and a reference for an accounting between the parties. The statute of frauds, however, presents an insurmountable obstacle to the relief prayed for by appellant. * * *

Judgment affirmed.

In most of the states, including Illinois, an oral lease of land for a term not exceeding one year is allowed. Rev. St., ch. 59, § 2.

In many of the states, including Illinois, the authority of an agent to execute a contract for the sale of real property or an interest therein for a longer term than one year must be in writing. Rev. St., ch. 59, § 2.

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§ 31 (B)—Sale Upon Execution or Pursuant to Decree.

CHANDLER v. MOREY.

1902. 195 Ill. 596, 63 N. E. 512.

MAGRUDER, J.—* * * The statute of frauds has no application to judicial sales. Section 2 of chapter 59 of the revised statutes relative to "frauds and perjuries," after providing that no action shall be brought to charge any person upon any contract for the sale of lands, etc., unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, etc., contains the following clause: "This section shall not

apply to sales upon execution or by any officer or person pursuant to a decree or order of any court of record in this state." Judicial sales are not within the statute of frauds, and are binding upon the bidder or purchaser without any written contract or memorandum of sale signed by him or his agent. (6 Ballard on Real Prop., § 850; Robertson v. Smith, 94 Va. 250; Andrews v. O'Mahoney, 112 N. Y. 567.) In Robertson v. Smith, *supra,* it was said by the court: "Judicial sales made by chancery courts, through their commissioners, are not within the statute of frauds, and are binding upon the bidder or purchaser without any written contract or memorandum of sale signed by him, or his agent. By bidding he subjects himself to the jurisdiction of the court, and, in effect, becomes a party to the proceedings in which the sale is made and may be compelled to complete his purchase by the process of the court." In Andrews v. O'Mahoney, *supra,* it was also said: "By bidding he subjects himself to the jurisdiction of the court, and in effect becomes a party to the proceeding, and he may be compelled to complete his purchase by an order of the court, and by its process for contempt, if necessary. The statute of frauds has no operation in such a case." (See also Warfield v. Dorsey, 39 Md. 299; 1 Reed on Statute of Frauds, § 304; Browne on Statute of Frauds (5th ed.), § 265.) Where a purchaser or bidder at such a sale fails to complete his purchase or comply with the terms of the sale, he may be proceeded against by rule and compelled to do so. (Clarkson v. Read, 15 Gratt. (Va.) 288.) * * *

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§ 31 (C)—Partly Performed Contract.

ASHELFORD v. WILLIS.

1902. 194 Ill. 492, 62 N. E. 817.

RICKS, J.—This is a proceeding by bill for an injunction, brought by appellant to restrain appellee in the enjoyment of a passageway across the northwest corner of appellant's land, and to prevent appellee from tearing down fences and structures put across such passageway by appellant. * * *

Practically all the writers on equity jurisprudence are agreed that contracts not under seal, and even contracts not in writing affecting or concerning an interest in land, are recognized in equity, if they have been so far performed that to permit a party to repudiate them would of itself be a fraud,—and this court is committed to that doctrine. (Martin v. Martin, 170 Ill. 639; Morrison v. Herrick, 130 *id.* 631; Fitzsimmons v. Allen's Admr., 39 *id.* 440; Ramsey v. Liston, 25 *id.* 114.) Derived from the above authorities, the rule seems to be, that where the contract is fully performed and a valuable con-

sideration paid and possession taken under it, the purchaser or grantee may, in equity, rely upon his title for a defense or enforce specific performance of the contract. Before the Statute of Frauds, by livery of seisin, lands were sold and conveyed without deeds. Afterwards the system of making conveyances in writing was inaugurated and the delivery of the deed took the place of livery of seisin. The Statute of Frauds was designed to avoid the tendency to irregular conveyances and to prevent perjury concerning the titles to lands, but it was never intended to enable anybody to perpetrate a fraud upon another. As has been aptly said by expounders of the law: "But equity will not allow a statute designed to prevent frauds to be made an instrument for committing them, and it will give relief where a wrongful advantage has been obtained by means of the statute."

It is always admissible, in determining the effect of an instrument or considering its meaning, to look to all the facts and circumstances surrounding the making of it. Taking the circumstances of the making of the writing from James Quinn to appellee into consideration, and the text of the instrument itself, and there is no room for doubt in the mind of the reader as to the intention of the parties. Appellee was about to buy a valuable piece of land that was so related to his other lands that it could not be reached without a long and circuitous route. The elder Quinn was interested in having his son sell his land and was urging upon appellee the purchase of it. Appellee raised the objection to buying land thus related to his farm, and stated that he would not become a purchaser unless that objection was overcome, which could be done by the granting to him of an easement over the corner of the land now owned by appellant. Appellee knew that without the grant of this easement this land must remain, for all practical purposes, separated from his other land in such a manner that two miles travel must be made to reach it, and that he could not, under the statute, by condemnation, secure a private road merely from one tract of land to another. To overcome appellee's objection and to perfect and insure that sale, James Quinn, for that consideration and the further consideration of five dollars in money, and as a part of the transaction between his son William and appellee, made the writing in question. In that it is expressly stated that "a right of way or easement over and upon and across a strip of land," etc., is granted, and with such particularity are the terms and purposes of the grant described that it is certain from the instrument itself that what James Quinn and appellee had in their minds was the granting of an easement over this land, and not a mere license that was revocable at the pleasure of James Quinn or anybody else. If this writing had had a seal, no one will pretend but that appellee had a good and perfect grant of an easement across this strip. In the further light of the facts concerning it, the conclusion is inevitable that this easement was designed to be appurtenant to the north-

west quarter of section 25, already owned by appellee, and the tract then being purchased of William Quinn. Louisville & Nashville Railroad Co. v. Koelle, 104 Ill. 455.

Under the whole evidence there can be no doubt, in our minds, but that the grant of this easement was the moving cause to the purchase of this land from William by appellee. He at once took possession of the strip of land covered by this easement and so enclosed it with his other lands, and so moved the fences of the lands of James Quinn, the grantor of the easement, that his intention to appropriate it absolutely to his own use and as a part of his enlarged farm was entirely manifest. With this use continued from 1892 to 1900,—the time when James Quinn sold to appellant,—we can come to no other rational conclusion than that the use he was making of it was not only justified by the writing, but was within the contemplation of James Quinn, the maker of that writing, and we think that under the rules of equity, whether that writing arose to the dignity of a deed or not, there was sufficient performance of the contract, and acquiescence in it by those who were parties to it, to take the transaction out of the Statute of Frauds in a court of equity. If this writing or grant had been of record when appellant purchased, he would have been bound to take notice of it, and with appellee in such open and long continued possession,—the only possession that he or any other grantee of a similar right could have,—appellant was likewise bound to take notice. In other words, he had notice by implication of law. (Willoughby v. Lawrence, 116 Ill. 11; Boyer v. Chandler, 160 *id.* 394; Coari v. Olsen, 91 *id.* 273.) When appellant purchased, this strip of land was fenced in with a part of appellee's farm, and appellant cannot, in equity, be allowed to say that he did not know that appellee had any rights or was in possession, until after his purchase. Whatever interest appellee did have in this strip of land by virtue of his contract with James Quinn, in view of the fact that he was in open possession of it at the time appellant purchased from James Quinn, he was as much entitled to assert against appellant as he would have been had James Quinn been the complainant in this bill. (Coari v. Olsen, 91 Ill. 273; Ingals v. Plamondon, 75 *id.* 118; Moore v. Flynn, 135 *id.* 74.) * * *

RIGGLES v. ERNEY.

1893. 154 U. S. 244.

BROWN, J.— * * * If the parol agreement be clearly and satisfactorily proven, and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part, has done acts in part performance of such agreement, to the knowledge of the defendant—acts which have so altered the relations of the parties as to prevent their restoration to their former condition—it would be a

virtual fraud to allow the defendant to interpose the statute as a defense and thus to secure to himself the benefit of what has been done in part performance. It must appear, however, that the acts done by the plaintiff were done in pursuance of the contract, and for the purpose of carrying it into execution, and with the consent or knowledge of the other party. While acts done prior to the contract or preparatory thereto, such as delivering abstracts of titles, measuring the land, drawing up deeds, etc., are not regarded as sufficient part performance, it is otherwise with such acts as taking open possession of the land sold, or making permanent or valuable improvements thereon, or doing other acts in relation to the land manifestly inconsistent with any other theory than that of carrying out the parol undertaking. * * *

PURCELL v. MINER.

1866. 4 Wall. (U. S.) 513.

GRIER, J.—A contract for the exchange of lands is as much within the Statute of Frauds as a contract for their sale, and a party seeking to enforce a specific execution of a parol contract for the purpose, must bring himself within the same conditions before he can invoke the aid of a court of equity. The statute, which requires such contracts to be in writing, is equally binding on courts of equity as courts of law. Every day's experience more fully demonstrates that this statute was founded in wisdom, and absolutely necessary to preserve the title of real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony. It has been often regretted by judges that courts of equity have not required as rigid an execution of the statute as courts of law.

Nevertheless, courts of equity have, in many instances, relaxed the rigid requirements of the statute; but it has always been done for the purposes of hindering the statute made to prevent frauds from becoming the instrument of fraud.

A mere breach of a parol promise will not make a case for the interference of a Chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof—

First. Of the contract, and of its terms. Such proof must be clear, definite and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus pœnitentiæ*. It cannot be made by mere

hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted or altogther fabricated; testimony, therefore, impossible to be contradicted.

Second. That the consideration has been paid or tendered. But the mere payment of the price, in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money.

Third. Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law.

Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession.

The application of these principles to the case before us will show that the plaintiff has wholly failed to establish a case proper for the interference of a court of equity.

We do not think it necessary to a vindication of our judgment to give a history either of the pleadings or evidence disclosed by the record. * * *

The bill must fail—

1. For want of clear, definite and conclusive proofs of the contract.

2. For want of any delivery of peaceful and uninterrupted possession.

3. Or of valuable improvements made.

We find no part execution on either side, nor anything but a breach of promise, and a consequent quarrel before the contract of exchange was executed.

EMMEL ET AL. v. HAYES ET AL.

1890. 102 Mo. 186, 14 S. W. 209.

SHERWOOD, J.—The controlling question in this cause, and the one to which our chief attention will be directed, is whether, upon the evidence adduced, the defendant O'Callahan was entitled to a decree for specific performance. The taking possession of a tract of land by a vendee under a parol contract made by a vendor to convey to him, and with the consent to such vendor, will take the case out of the statute of frauds, and authorize compulsory specific performance only where such taking of possession is pursuant to, and referable solely to, the parol contract. Nothing short of this unequivocal act of taking possession will suffice. This doctrine is of almost uni-

versal prevalence, and announced in cases too numerous for mention or of ready computation. It has obtained in this state since the earliest period of its history down to the present time, as the following cases will show: Bean v. Valle, 2 Mo. 126; Parke v. Leewright, 20 Mo. 85; Charpiot v. Sigerson, 25 Mo. 63; Wiley v. Robert, 31 Mo. 212; Ells v. Railroad, 51 Mo. 200; Spalding v. Conzelman, 30 Mo. 177; Bowles v. Wathan, 54 Mo. 261; Sitton v. Ship, 65 Mo. 297. And these cases are in accord with all well-considered cases elsewhere. This is abundantly shown by the authorities cited by counsel for plaintiffs. The uniform statement of the text-writers, and the reported rulings of adjudged cases, is that mere continuance of possession does not constitute part performance. There must be a radical change in the attitude of the contracting parties towards each other; a change consisting of acts done; a notorious change, which itself indicates that some contract has been made between the parties; and then parol evidence is admissible to show the details of the agreement. 1 Wood, Landl. & Ten. (2d Ed.) 374, and cases cited; Browne, St. Frauds (2d Ed.), §§ 455, 457, 472, 473, 477. In the last section cited the learned author says: "It is abundantly settled that if one who is already in possession of land as tenant verbally contract with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of part of performance, within the meaning of the rule, so as to justify a decree for a lease according to the contract. In such a case the continued holding is naturally and properly referable to the old tenancy, and does not necessarily imply any new agreement between the parties. The same reasoning applies, of course, where the contract set up is the sale of the estate to the defendant by the owner of the fee." Pomeroy says: "A plaintiff cannot, in the face of the statute, prove a verbal contract by parol evidence, and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself, or in his behalf, which point unmistakably to a contract between himself and the defendant, which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance cannot of themselves indicate all the terms of the agreement sought to be enforced, they must be consistent with it, and in conformity with its provisions, when these shall have been shown by the subsequent parol evidence. It follows from this invariable rule that acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of such a contract, do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties. * * * For a

like reason the mere possession of the premises by a tenant continued after the expiration of his term is not a sufficient part performance of a verbal contract to renew the lease or to convey the land, because such possession may be as reasonably and naturally explained by his holding over as by an agreement to renew or to convey. In other words, it does not unequivocally point to the existence of a contract between the parties, but is referable to another cause. The rule is general in its application, and fundamental in principle, that acts which are referable to something else than the verbal agreement, and which may be ordinarily otherwise accounted for, do not constitute a sufficient part performance of it." Spec. Perf. 154, 155. See, also, Fry, Spec. Perf., § 581; Bisp. Eq., § 385; Sugd. Vend. (14th Amer. Ed.), § 152; German v. Matchin, 6 Paige (N. Y.) 289. Speaking of the probative effect of possession, an author already quoted says: "Merely taking or holding possession is of itself nothing. The question is, *quo animo* it is taken or held, and this is not allowed to be answered by parol proof of the agreement between the parties. But in cases where a tenant continues in possession under an alleged agreement for a new tenancy, it is answered by proof of any act on his own part, done with the privity of the owner of the fee, which is inconsistent with the previous holding, and is such as clearly indicates a change in the relation of the parties. Where the tenant continuing in possession makes improvement upon the premises, this fact is of great weight to show a change in the holding; but they must, of course, be of such a marked and important character as to be not naturally reconcilable with the continuance of the old relation." Browne, St. Frauds, §§ 478, 480. * * *

MORRISON v. HERRICK ET AL.

1889. 130 Ill. 631, 22 N. E. 537.

BAILEY, J.— * * * The allegations of the bill in relation to the making of the oral agreement and the circumstances connected therewith are, in substance, that the complainants, during the time they had occupied said premises, had been doing a flourishing, profitable and constantly increasing business, and that they and their place of business had become widely known to the public; that for the purpose of retaining their position and competing successfully with rival establishments, and of still extending their business and patronage, it became very desirable that they should make extensive and costly improvements in their store, provided they could obtain a further lease for a sufficient length of time to warrant such expenditure; that they so informed said Morrison, and proposed to him, that if he would grant to them a lease of said premises for a term of

five years, to commence at the expiration of their then existing lease, they would make certain expensive and permanent improvements in said store, and would also put in new and expensive cases and fixtures, thus rendering it as fine if not the finest and most beautiful and attractive hat and cap store in the city of Chicago; that said Morrison approved of and assented to said proposition, and that it was thereupon agreed between him and the complainants that he would execute to them a further lease of said premises for the term of five years, beginning on the first day of May, 1885, and continuing until the 30th day of April, 1890, at a yearly rental of $3,000 for the first year, payable in monthly installments of $250, and at a yearly rental of $3,300 for each of the four remaining years, payable in monthly installments of $275 each.

It appears from the evidence, without any material controversy, that shortly after the time this agreement for a lease is alleged to have been made, the complainants proceeded to make their proposed improvements, those of a permanent character consisting of expensive panel work upon the ceiling, fresco painting on the walls, remodeling the front doors and windows and putting in stained or cathedral glass, costing in all about $1,700. They also constructed new cases of hard wood and plate glass, fitted and adapted to the store, with pulleys to raise and lower the doors and sashes, and also plate glass mirrors fitted and adapted to the spaces which they were to occupy on the walls, the total expense of such fixtures being about $3,300. To make room for these fixtures, those previously in use, and which cost $700, were removed and disposed of for only $150, that being all they would bring. A new furnace and new gas-fittings were put in at a cost of about $490. These expenditures were all made during the months of July and August, 1884. The time occupied in fitting up the store in the manner above indicated was from four to six weeks, and during that time the complainants' business was largely if not wholly interrupted, thus causing them considerable additional loss.

The evidence in relation to the alleged contract for a lease is in some degree conflicting, but after giving it careful consideration, we are of the opinion that it is sufficient to warrant the finding of the chancellor that such contract was in fact made. * * *

Regarding the oral contract for a lease as sufficiently proved, the question arises whether such part performance has been shown as will take it out of the operation of the Statute of Frauds. The authorities in this country as to what acts of part performance will be sufficient, in the view of a court of equity, to take an oral contract for the sale or lease of lands out of the statute are not altogether harmonious, and this court has not been disposed to carry the doctrine of part performance quite to the extent to which it has been carried by the decisions of some of the courts. Certain acts of part performance, however, have uniformly been held sufficient. Thus,

we have held in many cases, that taking possession of the land with the consent of the vendor, paying the purchase money, and making lasting and valuable improvements, are sufficient acts of part performance to justify the specific performance of an oral contract of purchase. Thorton v. Heirs of Henry, 2 Scam. 218; Updike v. Armstrong, 3 *id.* 564; Stevens v. Wheeler, 25 Ill. 300; Blunt v. Tomlin, 27 *id.* 93; Mason v. Bair, 33 *id.* 194; Fleming v. Carter, 70 *id.* 286; Laird v. Allen, 82 *id.* 43; McNamara v. Garrity, 106 *id.* 384; Gorham v. Dodge, 122 *id.* 528. In other cases it is held that taking possession and paying the purchase money is sufficient. Fitzsimmons v. Allen's Admr., 39 Ill. 440; Temple v. Johnson, 71 *id.* 13; Ferbrache v. Ferbrache, 110 *id.* 210; Ramsey v. Liston, 25 *id.* 114; Shirley v. Spencer, 4 Gilm. (Ill.) 583. In other cases it is held that taking possession and making valuable improvements is sufficient part performance. Keys v. Test, 33 Ill. 316; Kurtz v. Hibner, 55 *id.* 514; Wood v. Thornly, 58 *id.* 464; Langston v. Bates, 84 *id.* 524; Kaufman v. Cook, 114 *id.* 11; Bohanan v. Bohanan, 96 *id.* 591; Bright v. Bright, 41 *id.* 97; Padfield v. Padfield, 92 *id.* 198. It is under the rule established by the decisions last cited that the complainants in this case must base their right to have their oral contract for a lease specifically enforced.

The evidence shows beyond controversy that the complainants expended large sums of money in making permanent improvements upon the demised premises and in fitting up and furnishing the same for use in carrying on their business, and it is equally beyond controversy that these expenditures were made under and in reliance upon the oral contract for a lease for a further term of five years. So far then as the making of valuable improvements can constitute an element of part performance, the complainants have established their right to a decree. It is true the improvements were all made before the term contemplated by the oral agreement was to commence, and while the complainants were in possession under their former lease, but that circumstance does not seem to us to be material, so long as the improvements were in fact made in reliance upon and in pursuance of the provisions of the oral agreement.

The more difficult question relates to the possession which the complainants must establish and rely upon as an act in part performance. It is undoubtedly the rule that acts of part performance, whatever they may be, must refer exclusively to the contract, and be such as would not have been performed but for such contract. They must be such as cannot be explained consistently with any other contract than the one alleged; that is to say, they must refer to, result from, and be done in pursuance of such contract. If therefore possession is relied upon as an act of part performance, it must be possession under the contract sought to be enforced. The continuance of possession taken before the contract was made is accordingly not usually held to be sufficient. 2 Reed on Stat. of Frauds, sec. 585. This rule

applies especially to cases where the previous holding is under a lease, for as the tenant may lawfully continue in possession until notice to quit, such continuance in possession is presumptively referable to the lease. It has therefore been sometimes questioned whether, as between landlord and tenant, part performance is possible. But the better doctrine would seem to be, that one continuing in possession is at liberty to prove, if he can, that his possession, after the termination of the former lease, is under the oral contract.

The expenditure of money by the tenant in making improvements on the premises, on the faith of the oral agreement for a lease, may be viewed, not only as constituting of itself an act of part performance, but as furnishing strong if not conclusive evidence that the possession is continued under the oral contract and not under the lease. On this subject it is said by Mr. Browne: "It is always regarded as strongly confirmatory of the right of a plaintiff seeking the specific performance of a verbal contract, for an estate in land, that he has proceeded, upon the faith of the contract, and with the knowledge of the vendor, to expend money in improving the land. In cases of purchasers who were, before and at the time of the contract, tenants of the same land, it is often conclusive of the nature and animus of their continued possession; thus serving to explain and define one act of part performance by means of a superadded and corroboratory act. The propriety of admitting this expenditure of money in improvements as a reason for enforcing the contract, is much more clear upon the equitable view of preventing fraud, than is that of admitting the taking and delivery of possession. For in many cases such improvements are carried to that point that they are quite incapable of being compensated in damages." Browne on Statute of Frauds, § 487.

In Mundy v. Joliffe, 5 Mylne & Craig 167, a tenant who went into possession of premises under a former lease, obtained from his landlord an oral contract for a renewal of his lease for a further term, said contract stipulating, among other things, for the making of certain improvements on the demised premises. The tenant continued in possession, and after the stipulated improvements were made, brought his bill for a specific performance of the contract, and it was held, as a matter about which there could be no doubt, that a sufficient part performance was shown.

In Pfiffner v. S. & St. P. R. R. Co., 23 Minn. 343, it was held, that the making of substantial improvements pursuant to an oral agreement to convey the land improved, by a vendee who was in possession prior to and at the time of the agreement, is such part performance as takes the agreement out of the Statute of Frauds.

In Shillibeer v. Jarvis, 8 DeG., M. & G. 79, the lessee under an oral agreement for a lease was wrongfully and without the authority of the lessor let into possession, but being in possession, made certain repairs stipulated for in the agreement, and it was held that while

the possession, being unauthorized, would not be deemed a part performance, the making of the repairs was sufficient to take the case out of the statute; that if the delivery of possession had been authorized by the lessor, there would have been two acts of part performance.

In Jones v. Tate, 16 Fla. 216, a tenant in possession under a lease entered into an oral agreement with his landlord for a purchase of the demised premises. After making the agreement, he continued in possession and made valuable improvements, on the premises, and it was held that the improvements constituted a sufficient part performance. See also Ewing v. Gordon, 49 N. H. 344; Wills v. Stradling, 3 Ves. Jr. 381.

We are not disposed to depart from the rule to which this court has heretofore adhered, that to take an oral agreement for an estate in lands out of the Statute of Frauds, there must be both lasting and valuable improvements put upon the land and possession taken under the contract. The only rule we seek to derive from the authorities above cited is one of evidence. It is, that where a party claiming under an oral agreement was in possession under a prior agreement, and continues in possession without interruption, the fact that he has put lasting and valuable improvements upon the premises under and in part performance of the oral agreement may be resorted to as evidence showing or tending to show that his possession, after he became entitled therto under the oral agreement, is held under that agreement.

Applying this rule to the present case, we are disposed to hold, that, while, *prima facie,* the complainants, by remaining in possession after the expiration of the term to their former lease, assumed the position of tenants holding over, the presumption that they did so is not conclusive, but is subject to be rebutted by evidence tending to a contrary conclusion. Of this character is the evidence of the expenditures made by them by way of improvements under and in performance of their oral agreement. Those expenditures serve to explain and characterize their subsequent holding over after the termination of their former lease. Presumptions are thereby raised which are sufficiently cogent to overcome the ordinary presumption that a tenant holding over does so under his former lease. It is against all ordinary probability that, after having expended $6,000 or over in reliance upon and in performance of the agreement for a lease for five years, they were content to assume the attitude of mere tenants holding over, thus placing themselves in a position where their landlord would be at liberty to terminate their tenancy absolutely at the expiration of the first year, and thus deprive them, without the possibility of adequate recompense, of much the larger part of the benefit to be derived from their expenditures. * * *

PASQUAY v. PASQUAY.

1908. 235 Ill. 48, 85 N. E. 316.

FARMER, J.— * * * Appellant contends that the parol agreement set up in the bill is within the Statute of Frauds, and therefore invalid. * * * The bill alleges that "in pursuance thereof the said Ernest Pasquay, Rudolph Pasquay, and Albert Pasquay delivered to your complainant the exclusive possession of the said real estate above described, and she entered into possession of the same under and in pursuance of the said agreement and of the conveyances hereinafter mentioned." Where, pursuant to an oral sale of land, the consideration is fully paid and possession given the purchaser, this is a sufficient performance to take the case out of the Statute of Frauds. (Fitzsimmons v. Allen, 39 Ill. 440; Temple v. Johnson, 71 *id.* 13; Ramsey v. Liston, 25 *id.* 114; Morrison v. Herrick, 130 *id.* 631; Ashelford v. Willis, 194 *id.* 492.) In the last mentioned case it was said (p. 502): "While, at law, in order to constitute a valid conveyance of real estate or any interest in land it must be by deed having a seal and attended with certain formalities, yet in equity a good and indefeasible title may be conveyed without any writing whatever. The rights of the parties depend upon the character and extent of performance and the effect upon the donee by allowing repudiation. Practically all the writers on equity jurisprudence are agreed that contracts not under seal and even contracts not in writing affecting or concerning an interest in land, are recognized in equity, if they have been so far performed that to permit a party to repudiate them would of itself be a fraud, and this court is committed to that doctrine." * * *

GREEN v. JONES.

1885. 76 Maine 563.

FOSTER, J.— * * * Although it was formerly held otherwise, the authorities now all agree that mere payment of the consideration alone will not take it (the contract) out of the statute. Webster v. Blodgett, 59 N. H. 120; Glass v. Hulbert, 102 Mass. 28. Nevertheless, possession together with payment is sufficient part performance; and this act is greatly strengthened where improvements have been made, serving to explain and define one act of part performance "to which it is itself a superadded and contributory act." Browne, St. Frauds, § 487; Tilton v. Tilton, 9 N. H. 390; Wetmore v. White, 2 Caines' Cas. Err. 109; Story, Eq. Jur., § 763; Stark v. Wilder, 36 Vt. 755; Waterman, Spec. Perf., §§ 270, 280.

The law is thus correctly stated by the supreme court of Vermont:

"It is equally well settled that where the purchaser pays the whole or a part of the purchase money, and enters into possession of the premises, or does acts relying upon the agreement, that places him in such a position that the refusal by the seller to execute the contract on his part, will operate to his prejudice and injury, beyond the payment of the money, so that the repayment of the money, or the recovery of it, will not be an adequate remedy, then such acts will take the case out of the statute, and warrant a court of equity in decreeing a specific performance of the contract. A refusal under such circumstances to execute the contract, it is sometimes said in the books, operates as a fraud on the purchaser." Stark v. Wilder, 36 Vt. 755. * * *

GALBREATH v. GALBREATH.

1836. 5 Watts (Pa.) 146.

KENNEDY, J.— * * * The second matter complained of is that the court erred in charging the jury that "nothing but a written transfer, or a parol sale, accompanied with visible, distinct, exclusive possession, under such purchase would defeat the right of Samuel," meaning the plaintiff below. * * * The court seems to have left it to the jury, as if a change of the possession that was visible, distinct and exclusive, under a verbal contract for the sale of the land, would have been sufficient to have taken the case out of the statute, without any part of the purchase-money having been paid or expenses incurred by the purchaser in making valuable improvements upon it. Now, I must confess, I doubt very much whether a mere delivery of possession, without more, in such case, be sufficient to take it out of the statute. Although it be a partial execution of the contract, I am inclined to think it altogether insufficient to produce such an effect. To hold it to be so, would be directly in the teeth of the statute. I apprehend it is only where great injustice and injury would be done to the vendee, by turning him out of the possession acquired under a verbal contract for the sale of the land, and where he might be without a remedy affording an adequate compensation, that the statute ought to be held not to embrace the case. The bare loss of possession, it is conceived, cannot be such case, because it may be fully compensated by the recovery of damages from the seller. * * *

COOLEY v. LOBDELL.

1897. 153 N. Y. 596, 47 N. E. 783.

VANN, J— * * * The payment of the consideration alone is not enough, although learned judges differ as to the reason for the rule. * * * The more generally accepted, and, on the whole, more satisfactory, reason, is that, as the purchase money can be recovered back in an action at law, and the parties thus restored to their original position, the party paying is not injured, no fraud is perpetrated upon him by refusal to convey, and there is no occasion for a resort to equity. But, whatever may be the reason for the rule, as said by a recent author: "By an unbroken current of authorities, running through many years, it is settled too firmly for question that payment, even to the whole amount of the purchase money, is not to be deemed such part performance as to justify a court of equity in enforcing the contract." Browne, St. Frauds (5th Ed.), § 461. See, also, Winchell v. Winchell, 100 N. Y. 159, 163, 2 N. E. 897; Miller v. Ball, 64 N. Y. 292. * * *

FITZSIMMONS v. ALLEN'S ADMR.

1866. 39 Ill. 440.

BENJAMIN ALLEN and Jacob Fitzsimmons made an exchange of lands, each going at once into possession of the tract he traded for, Allen receiving title papers for his land, and Fitzsimmons receiving no title papers for his land, consisting of 80 acres.

LAWRENCE, J.—This was a bill in chancery, brought by Fitzsimmons against Allen, to compel the conveyance of eighty acres of land. Allen died pending the suit, and his administrator and heirs were brought in by supplemental bill. The case was brought to a hearing upon the pleadings and proofs, and the Circuit Court dismissed the bill. * * * It is insisted by the defendants, that the case falls within the statute of frauds. But the consideration for the land was fully paid and possession given to the purchaser. This is a sufficient performance to take the case out of the statute.

We are of opinion that there should be a decree for the conveyance of the eighty acres of land, and for an account of the rents and profits since the commencement of the suit.

Reversed and remanded.

WALL v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

1893. 86 Wis. 48, 56 N. W. 367.

THE R. R. Company, having a written option (modified by a subsequent verbal agreement) for the purchase of a strip of land, exercised it within the prescribed time, entered into possession of the strip and expended $25,000 in building a railroad across the same.

Action by Wall against the R. R. Company, to have the agreement adjudged null and void. Judgment for defendant. Appeal.

CASSODAY, J.— * * * This court has frequently held that the mere payment of a portion, or even the whole, of the purchase price, is not such part performance as to take the case out of the statutes. On the other hand, this court has frequently held that payment of any considerable part of the purchase price, and the vendee's entry into possession and making valuable improvements thereon, constitute such part performance of an oral agreement for the sale of land as will take the case out of the statute of frauds, and justify the enforcement of specific performance. McWhinne v. Martin, 77 Wis. 182, 46 N. W. 118, and the numerous cases there cited by Mr. Justice Taylor. See, also, Lanyon v. Martin, L. R. 13 Ir. Ch. 297; Brown v. Sutton, 129 U. S. 238. So, where there has been such part performance by the vendee that it would operate as a fraud upon him to allow the vendor to repudiate the contract, the same will be enforced in equity. Paine v. Wilcox, 16 Wis. 202; Martineau v. May, 18 Wis. 54; Seamon v. Ashchermann, 51 Wis. 678; 8 N. W. 818; Cutler v. Babcock, 81 Wis. 195, 51 N. W. 420. The underlying principle here applicable is well expressed by Mitchell, J., in Brown v. Hoag, 29 N. W. 137, 35 Minn. 375, where it is said: "He (the appellant) invokes the rule that acts relied on as part performance must be referable to and done in pursuance of the contract, and seems to assume that this includes only acts which were stipulated to be done in the contract itself, and as a part thereof. We do not understand this to be the law. While the phrase 'part performance' is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, yet the whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. Hence the term 'part performance' falls far short of expressing the whole doctrine and theory of courts of equity in this matter. The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon, and in pursuance of, the oral agreement, and so connected with the performance of the contract that, from the nature of the case, the defendant should understand it was done in reliance upon his agreement. The acts done

must be related to and connected with the contract, and the defendant's performance of it. * * * But this change of situation is not confined to doing what the contract stipulated,—that is, 'part performance,' strictly so called." As indicated in the foregoing statement, the company entered into possession, and after the company declared its option to purchase under the contract, and the written contract was modified by parol, the said company, relying thereon, constructed its road across said land, and expended a very large amount of money in performance or pursuance of such contract so modified. * * * The facts found by the court manifestly justify the decree entered. The judgment of the circuit court is affirmed.

TOWNSEND v. VANDERWERKER.

1895. 160 U. S. 171.

BROWN, J.— * * * Does the statute of frauds stand in the way of a decree in his favor? As there was no contract in writing, plaintiff must maintain his bill, if at all, upon the theory of a part performance. He must maintain it, too, upon the same principles and with the same cogency of proof as if it were in fact, as well as in substance, a bill for a specific performance. In this connection, the allegation is in effect that the plaintiff arranged with Mrs. Marvin to pay half the cost of the lot, and half the cost of erecting a dwelling thereon, he to purchase the materials and superintend the erection of the dwelling, and that each was to own half the property; that he performed his contract in full; that she not only never questioned that he had paid his half in full, but stated to him and to mutual friends that he had paid in full, and was jointly interested with her in the premises; that his ownership of half the premises was never disputed by her, but was openly recognized, and that, when he requested a settlement and that she convey his half to him, she replied that she had provided for that in her will, by which she gave him the entire property.

Admitting to the fullest extent the proposition that a mere payment of the consideration in money is insufficient to remove the bar of the statute, there is no doubt that such payment, accompanied by an entry into possession under the contract, is such a part performance as will support the bill. This court so expressly decided in the case of Neale v. Neale, 76 U. S. 9 Wall, 1. And in Brown v. Sutton, 129 U. S. 238, it was held that where the defendant's intestate bought certain property for the complainant, under a promise made orally that he would make over the title to her upon consideration that she should take care of him during the remainder of his life, as she had done in the past, there had been sufficient part performance

of this parol contract to take it out of the operation of the statute of frauds, and render it capable of being enforced by a decree for specific performance. Similar cases of promises to convey property upon the consideration of support are frequent in the books. Gupton v. Gupton, 47 Mo. 37; Sutton v. Hayden, 62 Mo. 101; Hiatt v. Williams, 72 Mo. 214, 37 Am. Rep. 438; Watson v. Mahan, 20 Ind. 223; Twiss v. George, 33 Mich. 253; Warren v. Warren, 105 Ill. 568; Patterson v. Patterson, 13 Johns. (N. Y.) 379.

The general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defense and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays or to an action upon a *quantum meruit* for the value of his services. In discussing what are and what are not acts done in part performance, which will entitle the plaintiff to a decree in his favor, the entry into possession of the land and the making of valuable improvements thereon are treated by all the cases as one of the most satisfactory evidences of part performance, and entitling plaintiff to a decree in his favor. 3 Pom. Eq. Jur., § 1409; Fry, Specific Performance, § 585; Wills v. Stradling, 3 Ves. Jr. 378; Mundy v. Jolliffe, 5 Myl. & C. 167; Williams v. Evans, L. R. 19 Eq. 547.

Although there is no distinct allegation in this bill that the plaintiff entered into possession, there is an allegation that the land in question consisted of a lot 34 feet in width by 110 feet in depth, and that the plaintiff gave his personal attention to the selection and purchase of the materials for a dwelling house and the erection of the same upon this lot, and paid $4,000 in defraying the cost of the house—facts which are inconsistent with any other theory than that he took possession of the lot for the purpose of erecting the house. Whitsitt v. Pre-emption Presby. Church, 110 Ill. 125. If he subsequently and after the completion of the house allowed Mrs. Marvin to take possession of the lot, in view of the intimate relations between them, he lost no rights as against her which he obtained by his original entry and the erection of the house. The possession thus taken was evidently in performance of and in reliance upon the original agreement with the owner, and we think, taken in connection with the improvements made by him, it makes a case of part performance sufficient to remove the bar of the statute. His subsequent relinquishment of such possession was evidently with no intention to abandon the interest he had already acquired in the property. Drum v. Stevens, 94 Ind. 181. * * *

FREEMAN v. FREEMAN.

1870. 43 N. Y. 35.

GROVER, J.— * * * The question is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, makes comparatively large expenditures in permanent improvements upon the land. It is, and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise, under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession; no part of the purchase money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case possession has been taken under the promise, and the expenditures upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is, that possession has been taken, and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted, that an executory promise, not founded upon any valuable consideration, is a mere nude pact, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise made to the party making the ex-

penditure, to give the land to such party, constitute in equity a consideration for the promise. Lobdell v. Lobdell, 33 How. Pr. (N. Y.) 347; 32 *id.* 1; Crosbie v. McDaul, 13 Ves. 147; Shephard v. Bivin, 9 Gill. (Md.) 32; 3 Pars. Cont. 359. * * *

GAINES ET AL. v. KENDALL.

1898. 176 Ill. 228, 52 N. E. 141.

WILKIN, J.—The theory of the appellants is, that appellee, soon after the marriage of Ralph Gaines and Frankie Kendall, agreed and promised the former that if he and his wife would go upon this land and improve it, he would make them a deed to it upon his son, George, becoming twenty-one years of age, and that in pursuance of that promise and agreement they entered into possession of the land, occupying it as their home, and made valuable improvements thereon. This, under the decisions of this court, if established by the proof, is sufficient to entitle the complainants to a performance of the contract. (Langston v. Bates, 84 Ill. 524; Bright v. Bright, 41 *id.* 97; Kurtz v. Hibner, 55 *id.* 514; McDowell v. Lucas, 97 *id.* 489; Warren v. Warren, 105 *id.* 568; Smith v. Yocum, 110 *id.* 142.) These authorities are full to the effect that although the contract was a mere verbal one, taking possession under the agreemnt and making the improvements as alleged will take the case out of the statute of frauds. * * *

From a careful review of the whole record we are satisfied the action of the court in dismissing the bill was erroneous. The decree should have been for the complainant, as prayed, for the 105 acres described in the bill, except three acres in the southwest corner of the tract. The decree will accordingly be reversed and the cause remanded, with directions to enter a decree as here indicated.

Reversed and remanded.

The 17th section of the English statute (29 Car. II, c. 3) is in the following language:

"No contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

This section with some modifications has been adopted in a majority of the states.

Neither this nor any similar statutory provision is in force in Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia or West Virginia.

For summary of the leading doctrines affecting contracts for the sale of goods in those states, where such statutory provisions are in force see Benjamin, Principles of Sales, Ch. VIII.

CHAPTER IV.

CAPACITY OF PARTIES.

The following persons are incapable wholly or partially of binding themselves by contract;
Minors.
Persons of unsound mind.
Drunken persons.
Persons under conservators.
Corporations.

MINORS.

§ 32.—Who are Minors.

For most purposes the law takes no notice of fractions of a day in computation of time.

BARDWELL v. PURRINGTON.

1871. 107 Mass. 419.

AMES, J.—A person who was born on the 8th day of September, 1852, would become of the full age of twenty-one years if he should live to the 7th day of that month in 1873. He would be entitled to be considered as having attained his majority at the earliest minute of that day. * * *

In several of the states, including Illinois, the age of majority for females is fixed by statute at eighteen years. Rev. St. Ill., ch. 64, § 1.

In law language minors are commonly called infants.

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§ 33.—Can a Minor Delegate Authority Requiring a Power of Attorney.

LAWRENCE v. McARTER.

1840. 10 Ohio 38.

LANE, C. J.— * * * It is claimed by the plaintiff that the letters of attorney are void, incapable of ratification, and never well executed.

We are then led to the oft discussed and yet not settled question, as to what acts of an infant are void and what voidable. No accurate

test has yet been propounded to determine this important point, and the authorities seem rather to decide individual cases than to give a comprehensive and intelligible rule. Yet in all, and from the earliest, we find it laid down, that deeds which do not derive their efficiency from delivery only, are void; and it has been held in many cases, and, as far as I can learn, without a dissenting opinion, or a contradictory authority, that letters of attorney, conveying no present interest, are absolutely null.

It would be a bold act to attempt to withstand this body of precedent, and we cannot but recognize it as destructive of that part of the defendant's title. * * *

ROCKS v. CORNELL.

1900. 21 R. I. 532, 45 Atl. 552.

PER CURIAM.—The testimony shows that the complainant at the time of executing the mortgage was an infant, and so incapable of appointing an attorney. The power of sale in the mortgage, therefore, so far as relates to her interest in the land, was invalid, and the sale under it absolutely void as to her. Note to Vasse v. Smith, 1 Am. Lead. Cas. (5th ed.) 247, 248; Tyler, Inf. 46, 47; Schouler, Dom. Rel., § 406, and cases cited; 1 Am. & Eng. Ency. Law (2d ed.) 940. * * *

KNOX v. FLACK.

1853. 22 Pa. St. 337.

LOWRIE, J.—This is a judgment entered on a warrant of attorney against a minor, and the court below refused to set it aside. It is of no manner of importance what were the circumstances under which the bond was given, for the warrant is clearly void, and the judgment ought to have been vacated on the infancy being shown. 1 H. Bl. 75; 18 Eng. C. L. R. 209n; 30 *id.* 362; 4 Mees. & W. 650; 2 W. Bl. 1133; 6 Cowen (N. Y.) 393; just as the warrant of attorney of a married woman is void; 9 State Rep. 14; 18 *id.* 79; 3 Whart. 309; 2 Camp. 272; 4 T. R. 362. * * *

FUQUA v. SHOLEM.

1894. 60 Ill. App. 140.

WALL, J.—This was a bill in chancery to set aside a judgment by confession on the ground that the complainant was a minor when he signed the promissory note which contained a power of attorney to confess judgment, and upon the authority whereof the judgment was entered.

Upon final hearing on bill, answer, replication and proof, the bill was dismissed, from which decree the present appeal is prosecuted. There is no dispute that the complainant was a minor when he signed the instrument in question (which was given for the price of a horse), and that he was still a minor when the cause was heard. The evidence tended to show that the animal was diseased and of little or no value. It also appeared that the complainant had parted with it before filing the bill. We think it was error to dismiss the bill. The rule is well settled that a minor cannot execute a valid warrant to confess judgment and that a judgment so entered should be set aside.

The warrant of attorney to confess and the judgment were wholly void. The court was as much without jurisdiction of the person of the alleged debtor as in the ordinary case where there is no service of process. Am. Lead. Cas., vol. 1, p. 248; Tyler on Infancy and Coverture, 47; Cole v. Pennoyer, 14 Ill. 158.

Cited and followed in Lowis v. Conrad Seipp Brewing Co., 63 Ill. App. 345, 349.

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§ 34.—General Rule as to Contracts of Minor.

COLE v. PENNOYER.

1852. 14 Ill. 158.

CATON, J.—The question as to what contracts by an infant are absolutely void, or only voidable, is one upon which there has been a very considerable diversity of opinion in different courts. All agree that the implied contracts of an infant for necessaries, are binding upon him, as in case of an adult, and all agree that the appointment of an attorney by an infant is absolutely void. The difficulty seems to have been in laying down a rule by which to determine satisfactorily what other contracts made by an infant are void, or merely voidable.

It was laid down by Lord Mansfield, in Zouch v. Parsons, 3 Burr. 1794, that all contracts which take effect by the delivery of the in-

fant himself, are voidable, and not void; and that it is only such acts as take effect by the delivery of another for the infant, which are absolutely void. He denies the doctrine often asserted, that a lease by an infant reserving no rent, or the surrender of a lease without consideration, are void, as being manifestly prejudicial to his interests; and he says "there is no instance where the other party to a deed can object on account of infancy. Consequently, the infant may let the surrender stand, or avoid it: which proves it to be voidable only." Not long after, in the case of Keane v. Boycott, 2 H. Black. 511, Eyre, Ch. J., laid it down as a rule, that those deeds which the court could see and pronounce to be prejudicial to the interests of the infant, were void; while those which were manifestly to the advantage of the infant, as for necessaries, were binding, while all others were merely voidable, and might be confirmed or repudiated after he attains his majority. This rule is approved by Chancellor Kent in his Commentaries, understanding, as he evidently does, that it does not conflict with the case of Zouch v. Parsons, for he says the doctrine of that case "has been recognized as law in this country, and is not now to be shaken. On the authority of that case, even the bond of an infant has been held to be voidable only, at his election. It is an equitable rule, and most for the benefit of the infant, that conveyances to and from himself, and his contracts, in most cases, should be considered to be voidable." 2 Kent 236. Mr. Wallace, in a very learned note, where all the cases on the subject seem to be collected, says, "The numerous decisions which have been had in this country justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries; the only act which he is under a legal incapacity to perform, is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable, by him, at his election." If literally understood, there are certainly serious objections to the rule, that the court must, in every case, inquire whether the deed is for the benefit or to the injury of the infant, and thence determine whether it is void or voidable. In such an inquiry, is the court to look alone to the face of the deed? or shall it inquire into the circumstances of the transaction? If the former, the court must often be misled, for it is frequently the case that a deed for the conveyance of land shows but very little of the true character of the transaction, its object being merely to transfer the legal title without a strict regard to the real inducements and considerations which moved the party to the conveyance. If the rule be established, that the face of the deed shall determine whether it was to the advantage or injury of the infant, such deeds will always be framed with a view to that, and will never fail to show an advantageous bargain for the minor. There are serious objections, also, to requiring the court to hear evidence showing the circumstances of the sale, and thence determine the question of benefit or injury. In the

first place, it would interrupt the regular progress of the trial, by a collateral inquiry about facts which when ascertained might induce one to think the bargain advantageous, while another would think it ruinous to the interests of the infant. But in determining these questions, a certain regard must be had to the interests of the public—of those who may wish to purchase the estate. A subsequent purchaser finding a regular chain of title may be required to ascertain whether those through whose hands the title has passed, were capable of making an obligatory conveyance, and if he finds any of them are infants, take his chance of a subsequent ratification of the conveyance; but to require him to ascertain all the circumstances of the bargain, and from these to judge at his peril what the opinion of the courts might be of its beneficial character, would leave the common assurances of the country in quite too uncertain a condition. It is far better, in our judgments, to hold all conveyances made by infants in person voidable only, to be confirmed or repudiated by them as they may choose, after they arrive at years of legal discretion. A review of the authorities on this subject, would show that this rule has been generally, if not universally adopted, and it is certainly most to the advantage of the infant, while it best subserves the public interests. Leslie v. Frazier, Riley's Ch. R. 76; Cline v. Beebe, 6 Conn. 499; Drake v. Ramsey, 5 Ohio 152; Freeman v. Bradford, 5 Porter (Ala.) 270; Brackenridge v. Ormsbey, 1 J. J. Marshall (Ky.) 236; Bool v. Mix, 17 Wend. (N. Y.) 120; Gillett v. Stanley, 1 Hill (N. Y.) 122.

Were a deed to be held to be void, it would be binding upon neither party. The adult party might repudiate it as well as the infant; whereas, if held to be voidable only, the adult would be bound by it, leaving it optional with the infant, after he attains his majority, to ratify it or not. With this option, it cannot prejudice his interests. He is left to claim the benefit of the bargain if a good one, or to reject it if he has been overreached or imposed upon in his infancy. We have no hesitation in holding in this case, that the deed made by the plaintiff during his minority was voidable, but not void. He had a right to revoke it within a reasonable time after he became of age. * * *

THE PEOPLE v. MOORES.

1847. 4 Denio (N. Y.) 518.

ACTION on a bastardy bond executed by an infant.

BRONSON, C. J.—When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation. If this be not a general rule, it is at the least one of pretty wide application as a few

examples will prove. An infant is bound to pay a judgment, or a debt contracted for necessaries; and he may make a valid promise to refund the money to any one who will satisfy the judgment or debt. Clarke v. Leslie, 5 Esp. 28; Randall v. Sweet, 1 Denio (N. Y.) 460. An infant is under a legal obligation to provide for the support of his wife and children, and he is answerable on his contract for necessaries furnished to them. Turner v. Trisby, 1 Str. 168; Bull. N. P. 155; Reeve Dom. Rel. 234. After on order of filiation, an infant is bound by law to support his illegitimate child; 1 R. S. 642, § 2; and there can be no doubt but that his promise to pay for necessaries furnished to the child would be valid. The statute also obliges an infant to indemnify the city, town or county against the expenses of supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties for that purpose, as the only means by which he can obtain a discharge from arrest; *Id.*, p. 645, §§ 14, 15; and I think the statute has given him a legal capacity to make a binding obligation. In Baker v. Lovett, 6 Mass. 80, Parsons, Ch. J., said infants are bound by all acts which they are obliged by law to do. See also, U. S. v. Bainbridge, 1 Mason (U. S.) 83; People v. Mullin, 25 Wend. (N. Y.) 698; Winslow v. Anderson, 4 Mass. 376. We are of opinion that infancy is not a good defense to this action.

Judgment for the people.

AMEY v. COCKEY.

1891. 73 Md. 297, 20 Atl. 1071.

ALVEY, C. J.— * * * In the celebrated case of Zouch v. Parsons, 3 Burr. 1794, 1801, where the question was whether an infant's conveyance by lease and release was absolutely void, or only voidable, Lord Mansfield expounded fully the reasons of the disability and privilege of infancy, and pointed out the instances wherein that privilege was not available. In the course of his learned judgment he said: "If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him; as, if he makes equal partition, if he pays rent, if he admits a copyholder upon a surrender. But there is no occasion to enumerate instances; the authorities are express, and the reason decisive. Generally, whatsoever an infant is bound to do by law the same shall bind, albeit he doeth it without suit at law." And further on he says: "A right and lawful act is not within the reason of the privilege which is given to protect infants from wrong. His being compellable by any means or in any way to do it, proves the act to be substantially what he ought to do." The doctrine of that case has been repeatedly recognized as law in this country, and, as said by Chancellor Kent, is not now to be shaken. 2 Kent Com. 236. And in 2 Kent Com., p. 242, it is laid down as

text law, that "whatever an infant is bound to do by law, the general rule is, that the same will bind him if he does it without suit at law. If, therefore, he be a tenant in common, he may make a reasonable partition. He may discharge a mortgage on due payment of the mortgage debt. * * * There was no occasion, said Lord Mansfield, to enumerate instances. The authorities are express that if an infant does a right act which he ought to do, and which he was compellable to do, it shall bind him." Here, the partition that was made was such as a court of equity had ample power and jurisdiction to sanction, and require to be enforced upon proper application (Hewitt's Case, 3 Bland (Md.) 184; Williams v. Holmes, 9 Md. 281), and the parties having made the partition among themselves, and there being nothing to impeach its fairness and equality, a court of equity will not disturb it. * * *

PROUTY v. EDGAR.

1858. 6 Iowa 353.

THE complainant, an infant, holding the legal title in trust for his father, who had executed a bond for the conveyance of the same and received the purchase money, conveyed the land, while still an infant, to the defendant, in accordance with the requirements of the bond. Bill to set aside the conveyance.

STOCKTON, J.— * * * There is nothing on which complainant can base any claim whatever to the land. Holding the title as he did, for the benefit of his father, who had sold the land to defendant, and received the purchase money, we do not see how, even if his infancy was conclusively established, he could have resisted the claim of defendant for the conveyance of the legal title. He would have been required in equity to convey. "Whatever an infant is bound and compellable to do at law, the same shall bind him, although he does it without suit. Therefore, where an infant re-conveyed lands, which had been mortgaged to his father, the mortgage money having been paid off, the conveyance was held good." 4 Greenleaf's Cruise on Real Property, title 32, ch. 2, § 13; Zouch v. Parsons, 3 Burr. 1794; 2 Kent Com. 234. So, where a father had purchased land in the name of his infant son, for the purpose of defrauding his creditors, and had afterwards sold the land to a purchaser for a valuable consideration, and the infant had, at the father's instance, conveyed the legal title to the purchaser, it was held that he could not, after age, avoid his conveyance, because, though the legal title was cast upon him by the fraudulent conduct of his father, he had no right to the land against a creditor or purchaser; and therefore, when he conveyed to the purchaser from his father, he merely parted with the naked title, and only did that which a court of equity would have com-

pelled him to do, and which, if disaffirmed, he would be compelled to do again. Elliot v. Horn, 10 Ala. 348; 1 Am. Lead. Cas. 249.

RUSH v. WICK.

1877. 31 Ohio St. 521.

ACTION for breach of a marriage promise. Defense, that at the time the promise was made defendant was an infant under the age of twenty-one years. Demurrer to this defense overruled.

BY THE COURT.—The demurrer was rightfully overruled. A contract to marry, made by an infant, stands upon the same footing as respects his rights to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is voidable at his election. The fact that under the statute (67 Ohio L. 6) an infant may be joined in marriage at the age of eighteen, if a male, and sixteen, if a female, having first obtained the assent of the father, or in case of his death or incapacity, of the mother or guardian, does not affect the right to refuse to perform the contract.

The right to avoid or disaffirm the contract of an infant grows out of his supposed incapacity to protect himself from improvident bargains and relations. And there can be no case where the right to avoid or disaffirm is of more vital concern to his future welfare than where he has made an improvident marriage engagement. The infant's right to avoid such engagement or contract is affirmed by the following authorities. Holt v. Ward, 2 Strange 937; Cannon v. Alsbury, 1 A. K. Marshall (Ky.) 56; Hunt v. Peake, 5 Cow. (N. Y.) 475; Williard v. Stone, 7 Cow. (N. Y.) 22; Warwick v. Cooper, 5 Sneed (Tenn.) 659; Pool v. Pratt, 1 Chip. (Vt.) 252; Bac. Ab., title Infancy and Age, 135; 1 Chitty on Con. 222; Shouler's Dom. Rel. 535; Mackpherson on Infants 121.

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§ 35.—Adult Bound.

VOORHEES v. WAIT.

1836. 15 N. J. L. 343.

RYERSON, J.—The plaintiff in this court was also the plaintiff in the courts below. It appears he was an orphan under age, living with his mother. And while yet a minor, contracted with the defendant, to work with him, for certain wages, and to be instructed in a

trade, till the age of twenty-one, if the parties should so long agree. Under this agreement, he worked for the defendant some time, and then left him. The defendant refused to pay him the stipulated wages, and after the plaintiff became of full age, this action was brought. Upon this state of facts, the court of common pleas nonsuited the plaintiff, on the objection, that, he being under age when the contract was made, the defendant was not bound by it.

I am of opinion, the court below erred. "Infancy is a personal privilege, of which no one can take advantage but the infant himself; and therefore, though the contract of the infant be voidable, it shall bind the person of full age." It is therefore unnecessary to inquire how far the infant could bind *himself* by such a contract, as the case discloses. It is very clear, the other party is bound. Bac. Ab., title Infancy and Age, J. 4; Com. on Cont., 1 vol. 152; 3 Mod. 248; 1 Mod. 51; 2 Strange 937; Pen. 1049. And even if this principle did not apply to the case before the court—if the express contract were void, still the plaintiff is entitled to recover a reasonable compensation for the work and labor done.

The judgment of the common pleas ought, therefore to be reversed, and the cause sent back for a re-trial.

Judgment reversed.

It has been held that a court of equity will not decree specific performance of a contract in favor of a minor, because the remedy is not mutual. Flight v. Bolland, 4 Russ. 298; Ten Eyck v. Manning, 52 N. J. Eq. 51, 27 Atl. 900.

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§ 36.—Who Cannot Take Advantage of Minority.

HOLMES v. RICE.

1881. 45 Mich. 142, 7 N. W. 772.

MARSTON, C. J.—The law in recognizing the incapacity of infants to enter into certain contracts and declaring such contracts voidable does so for the infant's protection. Their contracts are not void but voidable, and it is for the infant to avoid the contract or ratify it, and not within the power of a stranger, certainly not of a wrongdoer, to set up the infant's incapacity to contract as a protection to himself. The contract though voidable, at the option of the infant, is valid as to third parties who are strangers to both parties to the contract, and not claiming under either.

NIGHTINGALE v. WITHINGTON.

1818. 15 Mass. 272.

PARKER, C. J.—That an infant may endorse a negotiable promissory note, or a bill of exchange, made payable to him, so as to transfer the property to an endorsee for a valuable consideration, seems to be well settled in the law merchant; and is no ways repugnant to the principles of the common law. * * *

It would be absurd to allow one who has made a promise to pay to one who is an infant, or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise; and it would impair the value of such contracts in the hands of infants, if they were unable to raise money on them, as others may do.

Whether an infant may void an endorsement so made, and oblige the promisor to pay to him, is a question not arising in this case; for there has been no countermand or revocation of the order to pay, which is implied in his endorsement. If an action should be brought against the infant, as endorser, for the default of the payment by the promisor, without doubt he may avoid such action by a plea of infancy. But that is a personal privilege, which none but himself can set up, in avoidance of any contract made in his favor. Oliver & Al. v. Houdlet, 13 Mass. 237; Boston Bank v. Chamberlain, 15 Mass. 220; Whitney v. Dutch, 14 Mass. 457. * * *

KINNEY v. SHOWDY.

1841. 1 Hill (N. Y.) 544.

ON ERROR from the Onondaga C. P. Action on the case by Kinney, before a justice, against Showdy, a school district collector, for selling the plaintiff's cow on a tax warrant for $16.12½ when $25 was bid for the cow. The $25 was bid by the plaintiff's son, who was an infant under twenty-one years of age, and the officer refused to receive the bid, and struck off the property to the next highest bidder. The justice refused to non-suit the plaintiff, and the jury found a verdict in his favor for $8.87½, the difference between the two bids. The C. P. reversed the judgment, on the ground that there should have been a non-suit. Kinney, therefore, brought this writ of error.

BRONSON, J.—The infant was not capable of making a binding contract for the purchase of the cow, and I think the officer was not obliged to receive his bid. True, the property might be put up again and resold if the infant refused to accept and pay for it; but the

officer was not bound to strike off the property on an offer which, if accepted, would not make a valid contract. The court of C. P. was right in reversing the judgment.

Judgment affirmed.

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§ 37.—In Case of Minor's Death, Insanity or Other Disability.

SAYLES ET AL. v. CHRISTIE ET AL.

1900. 187 Ill. 420, 58 N. E. 480.

MAGRUDER, J.— * * * The right to avoid a deed, made during minority, is not one, which is personal to the infant himself, but may be exercised by his heirs, as well as himself. The heirs of an infant may disaffirm his deed within the same time, within which the infant might himself disaffirm it, if he were living. (Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Wheaton v. East, 5 Yerg. (Tenn.) 41; Clammorgan v. Lane, 9 Mo. 473; Sims v. Eberhardt, 102 U. S. 300.) The appellant, Bessie Sanders Sayles, who filed the original bill in this case, and the appellant, Robert Allen Gates, who filed a cross-bill herein, are heirs of the deceased Minnie Belle Sanders Gates. The right to avoid the deed of the deceased minor belongs to them as such heirs, just as it belonged to the deceased before her death. * * *

PARSONS v. HILL.

1843. 8 Mo. 135.

TOMPKINS, J.— * * * It was contended that the defense of infancy was personal, and could not be set up by the administrator. In Bingham's Law of Infancy, p. 55, it is said, the heir or executor, sued on an infant's bond, may avoid it by pleading the infancy of the obligor. The heir is privy in blood, and the executor stands exactly in his testator's place; and both avoid the instrument in respect of the estate transmitted. The administrator stands in the place of the intestate, as the executor does of the testator. It would be a thing of evil consequence if a writing obtained as this was, should become even obligatory by the death of the obligor. * * *

CHANDLER v. SIMMONS.

1867. 97 Mass. 508.

WELLS, J.— * * * A spendthrift under guardianship cannot even make an acknowledgment that will take his debt out of the statute of limitations. But his guardian (conservator) may bind the estate of the ward by such an acknowledgment. Manson v. Felton, 13 Pick. (Mass.) 206-211. This is not denied as a general proposition, but it is contended that the right of a minor to avoid or affirm his deed stands upon a different footing; that it is a personal privilege to be exercised only by the minor himself. The case of Oliver v. Houdlet, 13 Mass. 237-240, is cited as authority to the point that the guardian of a minor cannot avoid his deed on the ground of minority. If that be so, it must be for the reason that the election, whether to avoid or affirm, is reserved to the minor until he shall be of age; and that a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward. It has indeed sometimes been held that the minor himself cannot avoid his deed until he is of age. Bool v. Mix, 17 Wend. (N. Y.) 119; Roof v. Stafford, 7 Cow. (N. Y.) 179; Zouch v. Parsons, 3 Burr. 1808. It is undoubtedly true that he cannot affirm it till then. But it is at least questionable whether he can be deprived of the right to re-enter or recover his property by suit while his minority continues. See Edgerton v. Wolf, 6 Gray (Mass.) 453; Bingham on Infancy, 60-63; 1 Washb. Real Prop. 306; Reeve Dom. Rel. 254. After he is of full age, if unable to exercise his privilege, by reason of mental or legal incapacity, it seems reasonable and consistent with the nature and purpose of this right, that it should be exercised for him and in his name by the guardian (conservator) who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs; and we cannot doubt that it may be also by a guardian appointed over his property for any cause for which adult persons are placed under guardianship. * * *

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§ 38.—At What Time Contract May be Avoided by Minor.

RILEY v. MALLORY.

1866. 33 Conn. 201.

ASSUMPSIT for money had and received. The plaintiff was a minor. In August, 1863, he purchased a gun of the defendant, and paid therefor the agreed price of five dollars. On or about the 25th of September, 1863, having determined to rescind the contract of

purchase, he notified the defendant that he rescinded the contract, tendered back the gun to him in as good condition, as when he took it, and demanded from him the five dollars paid him. The defendant refused to receive the gun and return the purchase money. Verdict for plaintiff. Motion for new trial for errors in the charge and rulings of the court.

BUTLER, J.— * * * The privilege of an infant to avoid contracts which are injurious to him, and rescind those which are not, is not an exception to a general rule, but a general rule with exceptions. The law assumes the incapacity of an infant to contract. It also recognizes the fact that the limitation of infancy is arbitrary; that it is indispensably necessary that an infant should be at liberty to contract for necessaries; and that he may happen to make other contracts which will be beneficial to him. It does not therefore forbid him to contract, but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not, whether executed or executory, and as well before as after he arrives at full age—excepting from the operation of the privilege only contracts for necessaries, contracts which he may be compelled in equity to execute, and executed contracts where he has enjoyed the benefit of them and cannot restore the other party to his original position. These exceptions are founded in the necessities of the infant, or required by a just regard for the equitable rights of others. The exception which the defendant claims to exist, founded on the simple fact that the infant has paid money in the purchase of an article not a necessary or upon a contract which would be otherwise voidable, has no element of necessity or equity to require or sustain it, and no settled recognition in the law.

Fifty years ago the Hon. Tapping Reeve, who had been for many years a judge of the superior court and for one year chief justice of the state, and who conducted one of the earliest law schools in the country, published his carefully prepared lectures on the law relative to the domestic relations. In his chapter on infants he states the law in relation to their privilege thus: "It is the privilege of an infant that he may rescind his contracts at pleasure. In ordinary cases he can avail himself of this privilege. It is not a matter of any moment whether the contract is a fair one or not, the infant may rescind it." (Page 227.) Again, on page 254, he says, "It is an universal rule that all executory contracts which are voidable on the ground of infancy may be avoided during infancy by the infant as well as afterwards, as when a minor promises to pay, etc. So too all contracts respecting property which are executed by delivery of some article on payment of money, may be rescinded by the minor both before and after the time of his coming of age." To these general rules he states the three exceptions; viz., contracts for necessaries; contracts, if not unequal, to effect what the infant is compellable in chancery to do, as making partition, releasing a mortgage, executing a trust, etc.; and

contracts under which the infant has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position. He states no other exceptions, and there were no others then known in the law. That work was then and is still an authority, and such then was and ever has been the law in this state, and it was correctly stated to the jury. * * *

GREGORY v. LEE.

1894. 64 Conn. 407, 30 Atl. 53.

TORRANCE, J.— * * * It appears that the defendant, a minor, agreed to hire the plaintiff's room for forty weeks at $10 per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room, and refused to fulfill said agreement, on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere. Under the facts stated, it must be conceded that this room, at the time the defendant hired it, and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary, for lodging comes clearly within the class of necessaries; and the room in question was a suitable and proper one, and during the period he occupied it was his only lodging room. "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt." Chapple v. Cooper, 13 Mees. & W. 252; 1 Swift Dig. 52. So long, then, as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but, as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties. The question now is whether he is bound to pay for the room after December 20, 1892. The obligation of an infant to pay for necessaries actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. Hyman v. Cain, 3 Jones (N. Car.) 111. And where an infant agrees to pay a stipulated price for such necessaries, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessaries. Earle v. Reed, 10 Met. (Mass.) 387; Barnes v. Barnes, 50 Conn. 572; Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761; Keen. Quasi-Cont., p. 20. This being so, no binding

obligation to pay for necessaries can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessaries. For the purposes of this case, perhaps, we may regard the transaction which took place between these parties in September, 1892, either as an agrement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it as what, on the whole, it appears the parties intended it to be, a parol lease, under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defense of infancy is a good defense; for in that case the suit is upon an executory contract to pay for necessaries which the defendant refused to take, and never has had, and which, therefore, he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defense. As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. Riley v. Mallory, 33 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. * * * As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." Tayl. Landl. & Ten., § 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner. The plea of infancy, then, under the circumstances, must prevail. * * *

ANNA C. WIELAND ET AL. v. MARGARETHA KOBICK.

1884. 110 Ill. 16.

SHELDON, Ch. J.—This was an action of ejectment, for the recovery of a certain lot of land in an addition to Chicago. There was recovery by the plaintiff, and the defendants appealed.

On the trial in the court below there was introduced in evidence, in defense, a deed from the plaintiff to Emily C. Cummings, in which it is recited that "Margaretha David (the plaintiff), unmarried, and of

age," for $3,500 conveys and quitclaims to Emily C. Cummings the property in question, and a deed from Emily C. Cummings to Anna C. Haas, one of the defendants. The plaintiff then introduced evidence to prove that at the date of the deed to Emily C. Cummings the plaintiff was a minor, and under the age of eighteen years, and that after coming of age she filed her disaffirmance of the deed, and a demand for possession of the premises, in the recorder's office of Cook county.

It is objected that the evidence is not sufficient to justify a recovery against all of the defendants, as there is no evidence to connect the three other defendants with Anna C. Haas. Defendants having pleaded the general issue only, it was not necessary, under the statute, for plaintiff to prove that defendants were in possession of the premises, or claimed an interest or title therein. Rev. Stat. 1874, chap. 45, § 22.

The only other question which appellants make upon the record, is as to the effect of plaintiff's deed to Emily C. Cummings—whether or not plaintiff was estopped from disaffirming such deed made while she was a minor, she having stated therein that she was of age. The authorities seem abundantly to establish that a defendant is not estopped from setting up infancy as a defense to a contract, by his fraudulent representations that he was of full age. Merriam v. Cunningham, 11 Cush. (Mass.) 40; Studwell v. Shapter, 54 N. Y. 249; Gilson v. Spear, 38 Vt. 311; Burley v. Russell, 10 N. H. 184; Conrad v. Lane, 26 Minn. 389; Brown v. McCune, 5 Sandf. (N. Y.) 228. In the latter case the court said: "We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age, and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general." And further on: "We are clear that the doctrine of estoppel is inapplicable to infants."

The conclusion, we think, from the authorities, must follow, that the statement in the deed of plaintiff that she was of age is not an estoppel to the disaffirmance of it.

The judgment will be affirmed.

PEMBERTON BLDG. & LOAN ASS'N v. ADAMS.

1895. 53 N. J. Eq. 258, 31 Atl. 280.

BILL by the Pemberton Building and Loan Association against George L. Adams.

BIRD, V. C.—The principal question in this case is whether the defendant, George L. Adams, represented himself to be of age, and on

such representations secured the loan of the moneys named in the mortgage. The evidence shows that when the parties were negotiating the person making the loan asked Adams if he was of age, to which Adams replied that he was. That such inquiry was made is not only established by the testimony of the person who made it, but by a bystander, who distinctly heard the inquiry, but did not hear the answer thereto, although he swears that something was said by way of reply. Adams says he made no representations concerning his age. I have no doubt but the inquiry was made, and that the answer was purposely false. It is equally clear that the statement that he was of age was relied upon; and that the loan would not have been made if the answer had been according to the fact. The law will not, under such circumstances, allow a fraud-doer to protect himself under the plea of infancy. Jones Mortg., § 631; Herm. Estop., p. 1232, §§ 1100, 1118; *Id.*, p. 1253, § 119; Parker v. Hayes, 39 N. J. Eq. 478, 479; *Id.*, 41 N. J. Eq. 630, 633, 7 Atl. 511; 2 Pom. Eq. Jur., §§ 780, 945. In the next place, Adams, after coming of age, retained the possession of this property, and claimed and enjoyed all the benefits of a conveyance thereof, and now raises this defense of infancy without offering to return the consideration money. Under these circumstances, his liability continues, even though there had been no fraud. Jones Mortg., §§ 104, 105; Herm. Estop., p. 1257, § 1121; 3 Wait Act. & Def. 443, and many cases there cited; 1 Story Eq. Jur., § 385. The complainant is entitled to a decree, with costs. I will so advise.

SCHMITHEIMER ET AL. v. EISEMAN.

1870. 7 Bush (Ky.) 298.

LINDSAY, J.—Appellant, Louisa Schmitheimer, was formerly the wife of Jacob Schnell, now deceased. During the life of her said first husband she joined with him in conveying to appellee, Eiseman, a certain parcel of land in the city of Louisville, inherited by her from her father.

In conjunction with her present husband she prosecutes this suit to have said conveyance set aside, and to compel appellee to restore to her the possession of the land. She claims that at the time of the execution of the conveyance she was an infant under the age of twenty-one years, and that she was induced to join in its execution by reason of the "threats, persuasion, and influence" of her first husband.

The allegation of infancy seems to be sustained by a preponderance of testimony; but it appears that before Eiseman could be induced to part with his money, or to accept the deed now sought to be vacated,

Louisa and her then husband, for the purpose of satisfying him that she had attained her majority, made oath before a notary public that to the best of their knowledge and information she was then more than twenty-one years of age. Appellee, relying upon the truth of the statement thus solemnly made, concluded the trade theretofore negotiated by making the agreed payments and accepting the title.

Appellants claim that because of the presence of the husband at the time the wife made this false statement, and deluded and misled appellee as to her true age, the law will regard her as acting under the coercion of her husband, and consequently innocent of all participation in the fraud then and there successfully practiced. * * *

Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor *femes-covert* are privileged to practice fraud upon innocent persons. (1 Story's Eq., p. 385; 8 B. Mon. (Ky.) 543; 14 B. Mon. (Ky.) 513.)

In this case the conveyance of appellant is only voidable. The contract of sale is fully executed. Appellee asks only to be left in the undisturbed possession of property for which in good faith he paid a fair and full consideration. The chancellor could give no relief to appellant without making himself a party to her iniquitous and fraudulent conduct, and we think he properly dismissed her petition.

Wherefore we affirm his judgment.

TUNISON v. CHAMBLIN.

1878. 88 Ill. 378.

BILL by Tunison to have his deed to Chamblin executed while a minor, set aside as a cloud on his title.

WALKER, J.— * * * Deeds made by a minor are not void but only voidable. Their validity does not depend on a ratification after the minor attains his age, but to avoid them he must by some act, clear and unmistakable in its character, disaffirm their validity. Notice that he disaffirms, followed by acts of ownership or such as indicate a claim of title against the conveyance intended to be disaffirmed, such as possession, suit to regain possession (Cole v. Pennoyer, 14 Ill. 158) or to cancel the deed, payment of taxes, selling (Black v. Hills, 36 Ill. 376), leasing or offering to sell or lease, improving the premises, or such like acts, within a reasonable period after arriving at age, which, in analogy to bringing ejectment after arriving at age, has been held by this court to be the limit of the time to disaffirm. Here, appellant by bringing suit within three years after arriving of age, disaffirmed his deed to Chamblin. * * *

SHREEVES v. CALDWELL.

1904. 135 Mich. 323, 97 N. W. 764.

MONTGOMERY, J.— * * * It has been held in a number of cases in this court that where one has during minority made a deed of land, and after reaching majority makes a deed to another, this amounts to a disaffirmance of the voidable deed. Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539; Corbett v. Spencer, 63 Mich. 731, 30 N. W. 385; Prout v. Wiley, 26 Mich. 164. But to constitute such second deed a disaffirmance, it must be inconsistent with the deed executed during infancy. 16 Am. & Eng. Ency. Law (2d ed.) 290. In McGan v. Marshall, 7 Humph. (Tenn.) 121, it is held that a mortgage of land given by an adult did not amount to a disaffirmance of a mortgage given during infancy. In the well-considered case of Manufacturing Company v. Lamb, 81 Mo. 221, the question was distinctly presented, and it was held that a quitclaim deed could not be treated as a disaffirmance of a mortgage given during infancy on the ground that both instruments could stand together; the deed not being inconsistent with the mortgage, and being operative to convey the equity of redemption. * * *

BAKER v. KENNETT.

1873. 54 Mo. 82.

WAGNER, J.— * * * Where the infant makes a conveyance of real estate, his mere failure for years to disaffirm affords no proof of a ratification. There must be some clear or positive act performed for that purpose.

The reason is plain enough. By his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. But where he has purchased or taken a lease to real estate, the case is different. There, if he wishes to rescind or disaffirm, he must do so in a reasonable time.

In speaking on this subject, the Supreme Court of Maine, in Boody v. McKenney (23 Me. 517), says: "When during infancy he has purchased real estate, or taken a lease of it subject to the payment of rent, or has granted a lease of it upon payment of a rent, in such cases it is obvious, when he becomes of age, that he is under a necessity, or that common justice imposes it upon him as a duty, to make his election within a reasonable time. He cannot enjoy the estate after he becomes of age for years, and then disaffirm the purchase and refuse to pay for it, or claim the consideration paid, or thus enjoy the leased estate, and then avoid the payment of the stipulated

rent, or receive rent on the lease granted and then disaffirm the lease. When he will receive a benefit by silent acquiescence, he must make his election within a reasonable time after he arrives at full age, or the benefits so received will be satisfactory proof of a ratification." (Ketsey's Case, Cro. Jac. 320; Evelyn v. Chichester, 3 Burr 1765; Hubbard v. Cummings, 1 Maine 11; Dana vs. Coombs, 6 Maine 89; Barnaby v. Barnaby, 1 Pick. (Mass.) 221; Kline v. Beebe, 6 Conn. 494.) * * *

Tested by these principles there can be no objection as to the reasonableness of the time in which the defendant disaffirmed the contract. He attempted to do so before he was of age, but in a few days thereafter he tried to rescind the contract, and, upon the refusal of the plaintiff, offered to give him two thousand dollars by way of compromise and also to include the improvements. But further, he did not remain on the place using it for his own purposes and benefit, but abandoned it and left it in a position for the plaintiff to occupy at any time he saw fit or proper to do so.

The disaffirmance was speedily made, and in the most positive and unequivocal manner. It is impossible then to hold the defendant bound by the contract. * * *

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§ 39.—How Contract May be Confirmed by Minor.

WHITNEY v. DUTCH.

1817. 14 Mass. 457.

An infant made his promissory note, and when of age, being applied to for payment, acknowledged that the money was due, and promised that, on his return to his home, he would endeavor to procure it and send it to the creditor.

Parker, C. J.— * * * The contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration on his part is necessary to defeat his power of avoiding it.

But the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of a part of the money due, or the interest; but by the words, oral or in writing, which import a recognition and a confirmation of his promise. * * *

BIGELOW ET AL. v. GRANNIS.

1841. 2 Hill (N. Y.) 120.

ASSUMPSIT. Defense, infancy at the time the promise was made; to which the answer set up was, that the defendant had made a new promise after he became of age. The proof tended to show a promise by the defendant, made to one who was attorney for the plaintiffs in another suit against the defendant; but the notes on which this suit was brought were not in the hands of the attorney, nor had he been employed to collect them at the time the new promise was made. The defendant objected that the alleged ratification did not bind him, because it was not made with the plaintiffs or their authorized agent. The judge overruled the objection. Verdict for the plaintiffs.

The defendant now moved for a new trial.

THE COURT.— * * * In the case of infancy, there must be a new promise or ratification of the contract after the defendant has attained the age of twenty-one years and, as in other cases of contract, the minds of the parties must meet. A promise to a stranger will not answer. It must be to the plaintiff, or, what is the same thing, to his attorney or agent.

New trial granted.

CONKLIN v. OGBORN.

1856. 7 Ind. 553.

DAVISON, J.— * * * It remains to be considered whether Conklin (defendant), after mature age, ratified and confirmed the contract for the purchase of the store goods charged in the complaint. This contract was voidable merely, not void; consequently, it was susceptible of ratification without any new consideration.

Was the contract ratified? Upon this subject the weight of authority seems to hold that such ratification must be express. It may, however, be proved in divers ways; but it cannot be inferred from a mere acknowledgment of the debt. * * * A promise to pay is evidence of ratification; so is a direct confirmation, though not in words amounting to a direct promise; as if the party should say, after coming of age, "I do ratify and confirm," or, "I do agree to pay the debt." Thompson v. Lay, 4 Pick. (Mass.) 48. Apply this exposition of the law to the case made by the evidence, and it will at once be seen that here there has been no express ratification. The language of the witness is, "defendant acknowledged his indebtedness to the plaintiffs;" but this is nothing more than a mere acknowledgment, and one from which an intent to ratify or confirm

cannot be inferred. This conclusion acquires additional support when we look into the entire evidence. As a whole, it plainly shows that he intended to avoid a promise. * * *

THOMPSON v. LAY.

1826. 4 Pick. (Mass.) 48.

PARKER, C. J.—The authorities cited, especially the cases of Whitney v. Dutch, 14 Mass. 460, and Ford v. Phillips, 1 Pick. (Mass.) 202, explicitly lay down the principle, that the promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification after he comes of age.

Such a ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt. * * * A promise to pay, is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise: as, if the party should say, after coming of age, *I do ratify and confirm,* or, *do agree to pay,* the debt.

But a ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened, or been complied with, before an action can be sustained. *I ratify and confirm my promise, provided I receive a certain legacy,* or, *if I succeed to a certain estate,* or, *if I recover a certain sum of money,* or, *if I draw a prize in a certain lottery,* would make a conditional promise or ratification, sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before. So an engagement or promise to pay when able, is a conditional promise, and the plaintiff, to avail himself of it, must give in evidence the ability of the defendant. It would not be necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an income from some source which would enable the party to pay, would be sufficient. * * *

In some of the states there are statutes providing that the ratification of a minor's contract must be in writing.

BOYDEN v. BOYDEN ET AL.

1845. 9 Met. (Mass.) 519.

ASSUMPSIT for goods sold and delivered, and on the money counts. Writ dated March 2d, 1843. At the trial in the court of common pleas, before Williams, C. J., the plaintiff gave in evidence a promissory note for $44, given to him by the defendants on the 12th of April, 1838. The defence was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th, 1818, and the other August 11th, 1819. There was also evidence

tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty-one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

SHAW, C. J.—The questions as to what contracts of an infant are void, and what voidable, and, in the latter case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. Whitney v. Dutch, 14 Mass. 457. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio,* and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor. Badger v. Phinney, 15 Mass. 359. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own—is

evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold, after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See Boody v. McKenney, 10 Shepley (Me.) 517.

Exceptions overruled.

FERGUSON v. BELL'S ADMR.

1852. 17 Mo. 347.

An infant executed a deed, and after coming of age, expressed satisfaction with her bargain, received part of the consideration money, and spoke of her intention to make a confirmatory deed, but died suddenly without having done so.

RYLAND, J.— * * * There is nothing in the objection that the contract for the deed to the real estate was made by Miss Bell, while she was a minor. She sold the real estate to the petitioners and made them a deed for it, and then executed another instrument in writing, by which she bound herself to make a confirmatory deed to the real estate thus sold and deeded, after she became of age. There was no necessity for any evidence of this confirmatory act, in writing. Any act of Miss Bell, showing her acquiescence in the sale and deed thereon by her after she became of age, would be sufficient—such as receiving a part of the consideration money for the land and expressing herelf satisfied with the contract. * * *

FORSYTH v. HASTINGS.

1855. 27 Vt. 646.

THE plaintiff while a minor, contracted to work for the defendant for a year, and worked for him only a part of that time, but until about one month after he became of age.

ISHAM, J.— * * * The whole case, so far as the right of the plaintiff to recover is concerned, rests upon the inquiry whether any fact is stated by the auditor, showing that that contract has been rati-

fied after he became of age. It is stated in the report, that the plaintiff continued in the service of the defendant under that contract, about one month after he was of age. The contract of the plaintiff, though he was a minor, was not void, but voidable, and could be ratified after his majority, so as to render it as legal and binding as if it had been made by him when of full age. We think this contract was ratified by the plaintiff, by his continuance in the service of the defendant for that period after he had arrived at full age. Those services during that time were rendered in pursuance of that contract, and was a recognition of its existence as binding between them, and when once ratified it became a binding contract of the parties from the time it was made. State v. Dimick, 12 N. H. 194; Harris v. Wall, 1 Exchequer 122; 1 Amer. Lead. Cas. 254, 256. The plaintiff, by the ratification of that contract, has placed himself in the same situation he would have been placed if he had been of full age, when the contract was first made. In that event, as he left the service of the defendant in violation of his contract and without reasonable excuse, he cannot recover for the services he has rendered.

The judgment of the county court is affirmed.

LOSEY ET AL. V. BOND, TRUSTEE, ET AL.

1883. 94 Ind. 67.

BEST, C.— * * * The complaint averred, in substance, that the appellee, on the 1st day of August, 1874, loaned to Robert C. Losey $3,000, payable five and one-half years after date, with ten per cent interest, evidenced by three certain bonds of $1,000 each, with coupons for the interest, payable semi-annually, thereto attached, and to secure the same Emma J. Losey and Robert C. Losey, her husband, executed to the appellee a mortgage upon her real estate in the complaint described; that Emma J. Losey and her husband, on the 7th day of April, 1875, by warranty deed, conveyed said real estate to Marquis D. Losey, and by said deed "it was provided that said grantee took said real estate subject to the payment of the mortgage of the plaintiff. * * *

The question presented by the ruling in sustaining the demurrer to the first paragraph of the answer of Emma J. Losey is whether her subsequent conveyance of the property as stated amounted to an affirmance of the mortgage. This is the controlling question in the case.

It is well settled that an infant *feme covert* may convey her lands in this state by deed in which her husband joins. Hartman v. Kendall, 4 Ind. 403; Johnson v. Rockwell, 12 Ind. 76; Scranton v. Stewart, 52 Ind. 68. She may likewise encumber them by mortgage. It is

also well settled that such deed or mortgage is voidable, and may be affirmed or disaffirmed by such person after she attains full age. Law v. Long, 41 Ind. 586; Dill v. Bowen, 54 Ind. 204.

The disability of coverture neither hinders her from disaffirming nor shields her from the consequences of affirming such conveyance or incumbrance. Miles v. Lingerman, 24 Ind. 385. In this respect she labors under no disability.

It is also well settled that an infant's conveyance of land in this state is disaffirmed by the execution of a deed of such land to another after such infant attains full age. Pitcher v. Laycock, 7 Ind. 398; Riggs v. Fisk, 64 Ind. 100.

This rule proceeds upon the ground that the last conveyance is entirely inconsistent with the first, and as the last is operative the first is disaffirmed.

This is not the rule, however, where the former conveyance was by way of mortgage. Such conveyance in this state only creates a lien, and a subsequent conveyance of the equity of redemption is not necessarily inconsistent with the lien created by the mortgage. It may be entirely consistent with such encumbrance. Its effect depends upon its terms, as it may or may not affirm or disaffirm the mortgage.

In this case it is not insisted that the mere conveyance of the land affects the question one way or the other, but it is insisted that as such conveyance, by its terms, was made subject to the payment of the mortgage, the conveyance of the land by the execution of such deed operated as an affirmance of the mortgage. The mere recital of the mortgage in such conveyance, it is said, is such recognition of its existence as amounts to its ratification. This position is not unsupported by authority.

In 1 Parsons on Contracts, p. 326, it is said, that whether an infant's verbal declarations can ratify his instrument under seal may not be certain, "but it is quite certain that if, in an instrument under seal, a person recites or refers to a former instrument also under seal made while he was a minor, this is a ratification of the first."

In Boston Bank v. Chamberlin, 15 Mass. 220, it was held that where an infant made a mortgage of his land, and after coming of age, conveyed the same land to another, subject to the mortgage, such conveyance was a confirmation of the mortgage.

In Allen v. Poole, 54 Miss. 323, it is said that if an infant makes a mortgage, and after he arrives at age conveys the land subject to the mortgage, such conveyance confirms the mortgage.

In Merchants' Fire Ins. Co. v. Grant, 2 Edw. Ch. (N. Y.) 544, it was held that where an infant executed a mortgage, and after attaining full age, made a will providing that all his debts should be paid, such direction evinced an intention to pay the debt, and operated as a confirmation of the mortgage.

In Phillips v. Green, 5 T. B. Mon. (Ky.) 344, it was held that where a person of full age conveys a portion of property in pursuance

of an arrangement to convey all, and in such deed recites a conveyance made of the residue while a minor, such reference amounts to a confirmation of such conveyance.

These references show that the mere recital of such encumbrance in a subsequent conveyance is such recognition of its continued existence as amounts to an affirmation of its validity, and in the light of these authorities it would seem that the stipulation in appellant's deed must be deemed a confirmation of the mortgage. * * *

The demurrer was, therefore, properly sustained, and as the motion for a new trial presents no other question, it was properly overruled.

LYNDE v. BUDD.

1830. 2 Paige (N. Y.) 191.

In April, 1818, J. Dearborn sold and conveyed to the defendant Budd, then being only twenty years of age, a lot of land in Homer, for the consideration of $600. At the same time Budd executed and delivered to Dearborn a bond and mortgage for the purchase money, one-half thereof to be paid immediately, and the residue June 1, 1819, with interest. The deed and mortgage were both duly acknowledged and recorded, and $300 of the purchase money was, on the day of the acknowledgment, paid to Dearborn by Budd. Budd went immediately into possession of the premises, and continued in possession thereof until after he became twenty-one years of age. Budd afterwards sold and conveyed the land to the defendant Rouse. The other defendants are subsequent purchasers from Rouse. All the defendants purchased with full knowledge of the mortgage, which was assigned to the complainant by the mortgagee in 1819. The only question now raised was whether Rouse and the purchasers from him took the land discharged from the lien, by reason of the infancy of Budd at the time the mortgage was executed.

The Chancellor.—The contract with the infant in this case was not void, but only voidable at the election of the grantee, when he became of age. He might then have relinquished the property to the grantor, and claimed back the money which had been paid at the time of the purchase. Willis v. Twambly, 13 Mass. 204. But by continuing in possession after he became twenty-one, and finally selling and conveying the land with warranty, he affirmed the contract. If an infant exchange lands, and, after he becomes of age, continues to occupy the lands taken in exchange, he affirms the bargain, and the exchange becomes perfect. Co. Litt. 51 b; 2 Vern. 225. In Kelley's Case, 1 Brownl. 120, where an infant took a lease of land, rendering rent, and continued in possession after he became of age, he was held personally liable on the covenant for the payment of the rent. In

this case the deed and mortgage, being given at the same time, are to be construed together, as forming only one instrument or contract. 1 Paige (N. Y.) 455. The infant cannot avoid one part and affirm the other. If, when he came of age, he had elected to avoid the bond and mortgage, the deed also would have been avoided. By continuing in possession and conveying the land he affirmed the whole bargain, and made himself legally liable for the payment of the residue of the purchase money. The cases of Hubbard v. Cummings, 1 Greenl. 11, and Roberts v. Wiggin, 1 N. H. 73, are directly in point on this question. The case of Badger v. Phinney, 15 Mass. 359, also shows that an infant cannot disaffirm the contract, and at the same time retain the fruits of the bargain which he has made while under age.

The mortgage in this case is therefore a legal charge upon the land; and there must be the usual decree directing a reference to compute the amount due, and for a sale of the premises on the usual notice, on the confirmation of the master's report. There must also be a decree over against Budd for the balance, if the premises do not sell for enough to pay the amount reported due, with the costs of this suit.

IRVINE v. IRVINE.

1870. 9 Wall. (U. S.) 617.

STRONG, J.— * * * The struggle at the trial was over the question, whether the plaintiff had not confirmed the deed after he came of age? He contended, and he asked the court so to instruct the jury, that an act of affirmance must be of as solemn a character as the deed itself. This instruction the court declined in terms, stating, however, that mere acquiescence, however long, if short of the statutory period of limitations, is not sufficient, and that an act of confirmation, if not equally solemn with the deed, must be of such a solemn and undoubted nature, of such a clear and unequivocal character, as to establish a clear intention to confirm the deed after a full knowledge that it was voidable. Certainly this was all that the plaintiff had a right to demand. There is a well recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those that are sufficient to confirm it. The authorities frequently assert that such a deed cannot be avoided except by some act equally solemn with the deed itself. Some assert that it cannot be done by anything short of an entry; and this whether the deed operates by livery of seisin, or transmits the title by virtue of the statute of uses. Others hold that it may be avoided, without a previous entry, by another deed made to a different grantee. But all the authorities recognize the doctrine, that acts which would be in-

sufficient to avoid such a deed may amount to an affirmance of it. While, generally, it has been held that mere acquiescence, though long continued, will not suffice; yet even that, in connection with other circumstances, may establish a ratification. Cresinger v. Lessee of Welch, 15 Ohio 193; Drake v. Ramsey, 5 Ohio 251; Ferguson v. Bell, 17 Missouri 347; Bostwick v. Atkins, 3 N. Y. 53. And, where an infant had sold land, and after coming of age saw the purchaser making large expenditures in valuable improvements upon the land sold, and said nothing in disaffirmance for four years (facts very like those appearing in this case), it was held that the circumstances were not such as to excuse this long silence, and there being evidence that after he had reached twenty-one years of age he had said that he had sold the land, had been paid for it, and was satisfied, and had authorized an offer to purchase it, it was ruled, as a legal conclusion, that he had confirmed his deed. Wheaton v. East, 5 Yerg. (Tenn.) 41-62. So in Wallace's Lessee v. Lewis, 4 Harr. (Del.) 75, it was adjudged that an infant's acquiescence in his deed for four years after he came of age, in view of extensive improvements made upon the property, amounted to a confirmation. See, also, Hartman v. Kendall, 4 Ind. 405.

There is a reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to his grantee. Now, if the deed be avoided the ownership of the land is re-transferred. The seisin is changed. There is fitness in a rule that title to land shall not pass, by acts less solemn than a deed; that its ownership shall not be devested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is, therefore, itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner. * * *

GOODNOW v. EMPIRE LUMBER CO.

1884. 31 Minn. 468, 18 N. W. 283.

GILFILLAN, C. J.—* * * * The main question in the case is, must one who while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not, (where there are no circumstances other than lapse of time and silence,) and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: Vaughan v. Parr, 20 Ark. 600; Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236; Praut v. Wiley, 28 Mich. 164; Gause v. Norcum, 12 Mo. 550; Norcum v. Gaty, 19 Mo. 69; Peterson v. Laik, 24 Md. 541;

Baker v. Kennett, 54 Mo. 82; Huth v. Car. Mar. Ry. & Dock Co., 56 Md. 206; Hale v. Gerrish, 8 N. H. 374; Jackson v. Carpenter, 11 Johns. (N. Y.) 538; Voorhies v. Voorhies, 24 Barb. (N. Y.) 150; McMurray v. McMurray, 66 N. Y. 175; Lessee of Drake v. Ramsey, 5 Ohio 252; Cresinger v. Lessee of Welsh, 15 Ohio 156; Irvine v. Irvine, 9 Wall. (U. S.) 617; Ordinary v. Wherry, 1 Bailey (S. Car.) 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: Holmes v. Blogg, 8 Taunt. 35; Dub. & W. Ry. Co. v. Black, 8 Exch. 180; Thomasson v. Boyd, 13 Ala. 419; Delano v. Blake, 11 Wend. (N. Y.) 85; Bostwick v. Atkins, 3 N. Y. 53; Chapin v. Shafer, 49 N. Y. 407; Jones v. Butler, 30 Barb. (N. Y.) 641; Kline v. Beebe, 6 Conn. 494; Wallace's Lessee v. Lewis, 4 Harr. 80; Hastings v. Dollarhide, 24 Cal. 195; Scott v. Buchanan, 11 Humph. (Tenn.) 467; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kinney, 3 Vt. 353; Richardson v. Boright, 9 Vt. 368; Harris v. Cannon, 6 Ga. 382; Cole v. Pennoyer, 14 Ill. 158; Black v. Hills, 36 Ill. 376; Robinson v. Weeks, 56 Me. 102; Little v. Duncan, 9 Rich. Law (S. Car.) 55.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in Wallace's Lessees v. Lewis, "a dangerous weapon of offense, and not a defense." For we cannot assent to the reason given in Boody v. McKenney (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification) "that by his silent acquiescence he occasions no injury to other persons and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily."

The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it, and the longer it may continue the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without delay whether he will exercise it. The right of

a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interest of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That 10, 15 or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy, (which is not subserved by cherishing defective titles,) and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. Cochran v. Toher, 14 Minn. 385, (Gil. 293); Derosia v. W. & St. P. R. Co., 18 Minn. 133, (Gil. 119). Three years and a half, the delay in this case, (excluding the period of plaintiff's minority, after the time within which to act had commenced to run,) was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified.

In Illinois it has been held in analogy to a statute of the state that three years is the period within which a minor after attaining majority may disaffirm a conveyance of real estate. Rev. St. Ill., ch. 83, § 8; Cole v. Pennoyer, 14 Ill. 158, 162; Blankenship v. Stout, 25 Ill. 132; Keil v. Healey, 84 Ill. 104; Sayles v. Christie, 187 Ill. 420, 437; 58 N. E. 480.

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§ 40.—When Minor is Bound to Restore Property.

BENNETT v. McLAUGHLIN.

1883. 13 Ill. App. 349.

APPELLEE while a minor had purchased a sewing machine paying in instalments, and the first instalment was paid by an old machine in lieu of money, and after becoming of age she retained possession of the new machine and refused to pay the other instalments.

Action of replevin by appellant to recover the possession of the sewing machine.

HIGBEE, J.—* * * When appellee refused to make further payments or surrender up the property, she had the same in her possession and was of full age, having attained her majority in December, 1881.

Her right to avoid the contract cannot be questioned, but it is a privilege secured to her by the law for her own protection, and she is not permitted to use it as a sword to injure others; she cannot retain the property purchased, after arriving at her majority, and at the same time repudiate the contract, under which she received it; and if she does repudiate the contract under such circumstances, the title remains in the vendor, and he is entitled to the immediate possession of the property. Reeve's Domestic Relations, p. 244; Heath v. West, 8 Foster (N. H.) 101; Kitchen v. Lee, 11 Paige (N. Y.) 107; Badger v. Phinney, 15 Mass. 359; Gray v. Lessington, 2 Bosw. (N. Y.) 257; Tyler on Infancy and Coverture, p. 78. * * *

EVANS v. MORGAN.

1891. 69 Miss. 328, 12 So. 270.

COOPER, J.—* * * Infancy, as has been uniformly said by the courts, is a shield for protection, and not a sword for attack. Under it the defendant may escape personal liability upon his contracts, but he cannot repudiate the contract and retain as his own its fruits. When property is bought by an infant upon credit, and being sued for the price, he pleads infancy, the seller may recover at law the property, the title being revested in him by the result of the suit for the price. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, and notes; Brantley v. Wolf, 60 Miss. 420; Henry v. Root, 33 N. Y. 526. *A fortiori* is the principle applicable in a court of equity. Kitchen v. Lee, 11 Paige (N. Y.) 107; Lynde v. Budd, 2 Paige (N. Y.) 191. * * *

MACGREAL v. TAYLOR ET AL.

1897. 167 U. S. 688.

THE appellee's testatrix Sarah Utermehle, loaned $8,000 to the appellant, Carlotta M. MacGreal, a minor, on the supposed security of a deed of trust of October 22, 1889, which was subsequently disaffirmed. The money obtained thereby was borrowed for the purpose

and used to pay off certain mortgages on her property dated March 8, 1886, and September 3, 1887, respectively, and to make substantial improvements on the same.

Suit in equity to foreclose the trust deed.

HARLAN, J.—* * * In the present case, it is beyond question that Mrs. MacGreal's deed, made while she was a widow and an infant, was voidable and that she disaffirmed it within a reasonable time after reaching her majority.

But does it follow that the plaintiffs are not entitled to relief on account of the money advanced by their testatrix, and which was lent to be applied and was applied in making valuable improvements upon the lot owned by the infant? If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improvement of her lot, the case would not be so difficult of solution; for it is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed and cannot be returned. In Boyden v. Boyden, 9 Met. (Mass.) 519, 521, Chief Justice Shaw, after observing that a contract with an infant is binding upon the other party until it is disaffirmed by the infant, said that if the infant "elects to disaffirm it, he annuls it on both sides, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor." In Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, Chief Justice Church, delivering the opinion of the court, said: "The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether." In Monumental Bldg. Asso. No. 2 v. Herman, 33 Md. 128, 133, it was said: "If the infant disaffirm an executed contract, and the specific consideration can be restored in whole or in part, the infant is treated as a trustee of the other party, and must give it up; but where the articles received by him are consumed or the money spent, the party advancing them is without a remedy." So in Chandler v. Simmons, 97 Mass. 508, 514, 93 Am. Dec. 117, the court said: "Another ground relied on by the defendant is that the deed (by the infant) cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid

his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity, that this right is maintained. Gibson v. Soper, 6 Gray (Mass.) 279-282, 66 Am. Dec. 414; Boody v. McKenney, 23 Me. 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will devest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589. Or, if he retains the use or disposes of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. Boyden v. Boyden, 9 Met. (Mass.) 519; Robbins v. Eaton, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. Dana v. Stearns, 3 Cush. (Mass.) 372-376. It is not necessary in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in *statu quo*. Tucker v. Moreland, 35 U. S. 10 Pet. 65-74; Shaw v. Boyd 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368. See also 1 Am. Lead. Cases, 5th ed. 224, 232, 249, 259; Mustard v. Wohlford, 15 Gratt. (Va.) 329, 340, 76 Am. Dec. 209; Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565; Eureka Co. v. Edwards, 71 Ala. 248, 256, 46 Am. Rep. 314; Corey v. Burton, 32 Mich. 30; Price v. Furman, 27 Vt. 268, 271, 65 Am. Dec. 194; Robinson v. Weeks, 56 Me. 102, 107; Carpenter v. Carpenter, 45 Ind. 142, 146; Harvey v. Briggs, 68 Miss. 60, 66, 10 L. R. A. 62; St. Louis, I. M. & S. R. Co. v. Higgins, 44 Ark. 293, 297; Reynolds v. McCurry, 100 Ill. 356, 359; Tyler's Infancy & Coverture, § 37, and authorities cited.

Does the present case come within the rule upon which Mrs. MacGreal relies? Under the terms of the loan, the money obtained from Mrs. Utermehle was used in lifting existing valid mortgages from her lot and in placing substantial improvements upon it; and she is in actual possession of the lot so improved and freed from the liens created by the deeds of March 8, 1886, and September 3, 1887, and subject to which she acquired the property. A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy. Mrs. MacGreal having disaffirmed her deed of October 22, 1889, she is not entitled, as between herself and the estate

of Mrs. Utermehle, to be protected except in the enjoyment of such rights in the property in question as she had at the time it was encumbered by her disaffirmed deed of trust. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate. Her lot was subject to prior liens on account of the debts due to Brough and Porter as well as for taxes. Those debts have been discharged, and her property is no longer in any danger from them. The liability of her property for those debts when the deed of 1889 was executed cannot be questioned. These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of $8,000 to be used in meeting those debts and in improving the lot in question. 1 Jones Mortg., §§ 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held—and gross injustice will be done in this case if it be not so held—that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong. * * *

RICE v. BUTLER.

1889. 160 N. Y. 578, 55 N. E. 275.

HAIGHT, J.—The appeal in this case is based upon the certificate of the appellate division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the municipal court of Syracuse to recover the sum of $26.25, paid by the plaintiff, a minor seventeen years of age, upon a contract for the purchase of a bicycle. The contract price was $45; $15 were paid upon the execution of the contract, and the remainder was to be paid in weekly instalments of $1.25. The plaintiff purchased the wheel in June, and used it until about the 20th of September, and then returned it to the defendant, asserting that she had been defrauded, and demanded repayment of the amount that she had paid upon the contract. The defendant took the wheel, but re-

fused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial evidence was submitted on behalf of the defendant tending to show that the use of the wheel and its deterioration in value equalled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

It is now contended that the contract was executory, and that, being such, the plaintiff had the right to rescind, and recover back the amount paid. The appellate division appears to have taken this view of the case, and has reversed the judgment. The question thus presented may not be free from difficulty. There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future, and the title was only to pass to the minor upon making all of the payments stipulated; but, insofar as the payments made were concerned, the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries (volume 2, p. 240), says: "If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other." In the case of Gray v. Lessington, 2 Bosw. (N. Y.) 257, a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract, and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for an infant to go into a court of equity to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit or benefit equivalent to such deterioration." In the case of Medbury v. Watrous, 7 Hill (N. Y.) 110, an action was brought by an infant to recover for services performed, of the value of $70. The defense

was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of $600. He had not entered into the possession of the house and lot, and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a *quantum meruit* for the work performed. Beardsley, J., in delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of Holmes v. Blogg, 8 Taunt. 508, and says, with reference to the later case: "It was not shown what had been the value of the use of the premises demised while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value. Otherwise, she would be making use of the privilege of infancy as a sword, and not as a shield. In the absense of wanton injury to the property, the value of the use would be deemed to include the deterioration in value, and, under the evidence in this case and as found by the trial court, the use equalled the sum paid. Our attention has been called to the cases of Pyne v. Wood, 145 Mass. 558, 14 N. E. 775, and McCarthy v. Henderson, 138 Mass. 310; but we think the rule suggested by us is more equitable, and that they should not be followed. The judgment of the appellate division should be reversed, and that of the trial and county court affirmed, with costs. * * *

But see Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813.

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§ 41.—Avoidance of Contract for Services.

DEROCHER v. CONTINENTAL MILLS.

1870. 58 Me. 217.

On exceptions.

Walton, J.—The question is, whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover

for his labor. We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated it, he must pay the damage. Such a doctrine cannot be maintained.

The decisions on this branch of the law furnish us with a curious and instructive illustration of the mischief that is liable to be done when judges undertake to generalize too much, and to decide more than is presented by the cases then before them. * * *

In Massachusetts, it was held that where an infant performs labor on a special contract, which he afterwards abandons, he may recover for his services, "as if no such contract had been made." This is undoubtedly the true rule of law. But in closing the opinion, the court inserted one of those unfortunate dicta, apparently unconscious that it was utterly inconsistent with the rule just laid down, namely, that the rule would do no injustice, "because the jury would give no more than under all the circumstances the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." "It seems, therefore," says the reporter in his syllabus of the case, "that if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account." The court just lay down the rule that the case is to be tried precisely as if no special contract had been made, and then add, in substance, that a deduction must be made for the breach of it. Moses v. Stevens, 2 Pick. (Mass.) 332.

In a later case in Massachusetts, the true rule is again stated, that by the avoidance of an infant's contract, it is annihilated *ab initio*, "and the parties are left to their legal rights and remedies just as if there had never been any contract at all;" and the absurd qualification annexed to it in the case just cited is, of course, omitted. Vent v. Osgood, 19 Pick. (Mass.) 572. * * *

We think the rule of law, applicable to this class of cases, is correctly stated in Vent v. Osgood, and in the opinion of this court in Robinson v. Weeks, 56 Maine 102; and is substantially this, that when an infant's contract is legally avoided, the rights of the parties are precisely the same as if it had never been made.

Having avoided her contract to work not less than six months, and not to leave without giving two weeks' notice, the plaintiff had a right to have her case tried and determined precisely as if no such contract had ever been made. Yet her case was not thus tried. The defendants were allowed, first, to show that such a contract was made, then the breach of it, then the loss resulting to them by reason of its breach. They then had the amount of such loss deducted from the wages due to the plaintiff; and the loss being greater than the wages, the plaintiff's suit was defeated, and judgment ordered for the defendants. Surely that was not having the rights of the parties tried and determined precisely as if no such contract had ever been made; for if no such contract had ever been made, certainly no such result could have been reached.

Exceptions sustained.

New trial granted.

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§ 42 (A)—Liability for Necessaries.

GAY v. BALLOU.

1830. · 4 Wend. (N. Y.) 403.

SUTHERLAND, J.— * * * The referees, who stand in the place of the jury, have found that the articles furnished by the plaintiff were necessaries, and that the defendant promised to pay for them. The evidence supports that finding.

All the charges are for boarding, lodging, schooling, clothing and physician's bills; and there is no evidence or allegation that they were unsuitable in any respect to the condition of the defendant. Bing. Infancy, 86, 87; Com. Cont., 154, 155; 2 Kent Com., 195. The report was not questioned on that ground upon the argument; but it was contended that there was no evidence of an express promise on the part of the defendant to pay, and that no promise can be implied. * * *

An express promise, I apprehend, need not be proved in order to render an infant liable for necessaries. Where the plaintiff's demand is not for necessaries, and the issue is upon a new promise after the defendant came of age, an express promise must be proved; because, there never having been any legal obligation on the part of the defendant, he cannot be legally liable without such promise. * * * But an infant is liable for necessaries, in the same manner as an adult is liable; and his contract or promise to pay is to be established in the same manner. If an infant direct a tailor to make him a suit of clothes, an express promise to pay for them is not necessary in order to make him responsible; or if he be accommodated

with board and lodging suitable to his condition, while pursuing his academical or professional studies, he is bound to pay what they are reasonably worth, though no actual promise to pay can be proved. The promise is implied, and being for necessaries, it is legal and binding.

The admissions of the defendant in this case afford sufficient evidence that the items of the plaintiff's account were paid or furnished at the defendant's request; and being suitable and necessary for a person in his condition, the law implies a promise on his part to pay for them. * * *

WALLIN v. HIGHLAND PARK CO.

1905. 127 Iowa 131, 102 N. W. 839.

THE plaintiff, a minor, entered the pharmacy department of Highland Park College under a written contract that provided for a course of 12 weeks' instruction therein, and for the payment of a stated sum for tuition, board, room rent, light, heat, etc., aggregating the sum of $83. He paid this sum in advance, quit the school soon thereafter, and brings this suit to recover the unearned portion of the sum so paid. Judgment for defendant. Appeal.

SHERWIN, C. J.— There is no dispute as to the facts in this case, and it is conceded that a course in pharmacy may come within the definition of necessaries for which a minor may be bound by contract; hence the vital question for determination is whether a minor's contract for necessaries is voidable before such necessaries are actually supplied him. In other words, may a minor disaffirm an unexecuted contract which would have bound him absolutely had it been fully performed. Section 3189 of the Code, in effect, says that a minor is bound by his contract for necessaries, and by all other contracts unless they be disaffirmed, etc. But in construing the statute we should look to the reason thereof as an aid to a just determination of the legislative intent. An infant in law has from the earliest time been the ward of the court, and, speaking generally, is incapable of making other than a voidable contract. The one universal exception to this rule is that he may bind himself to pay for his necessary "meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards." 1 Cooley's Blackstone, 412. An infant is not permitted to contract generally, because of his immature judgment, and the injury he might suffer on account thereof, and he is only permitted to contract for necessaries because otherwise he might suffer for want of them. It is therefore apparent that the protection of the infant is the purpose of the exception as well as of the general rule. Both of these propositions are so firmly established by authority that

we need not cite the cases in support thereof. The great weight of authority, and the reason of the rule certainly sustains it, is that an infant is not bound by the terms of an express contract for necessaries, and that in no event can a recovery be had for more than their reasonable value. Bishop on Contracts, § 908; Beach on Contracts, § 1368; Locke v. Smith, 41 N. H. 346; Trainer v. Trumbull 141 Mass. 527, 6 N. E. 761; Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. It is therefore manifest that contracts for necessaries are sustained for the benefit of the infant only, and not for the benefit of the tradesman. See, also, note in Craig v. Van Bebber (Mo.), 13 S. W. 906, 18 Am. St. 643. And, if this be true, it must logically follow that an unexecuted contract for necessaries may be disaffirmed unless it be otherwise provided by statute. Johnson v. Lines, 6 Watts and S. (Pa.) 80, 40 Am. Dec. 543; Pool v. Pratt, 1 D. Chip. 252; Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; Pollock's Prin. of Contracts, 53, and note F. For the necessaries which have been furnished to him the infant is bound to pay because of the benefit received, but when the unfurnished things contracted for are no longer necessary the reason for the rule ceases, and with it the infant's liability, if he chooses to disaffirm the contract. Were the rule otherwise, a contract for necessaries to be supplied in the future might be enforced to the great injury of the infant because of a change in his condition which rendered the things no longer necessaries. The statute, in so far as it relates to contracts of this class, is simply declaratory of the common law, and must be held to intend nothing more than that an infant is bound for necessaries actually provided him. The rule may be an unjust one in some cases, but it will generally protect the tradesman as well as the infant, and it is, we believe, in accord with principle and authority.

The judgment is reversed.

KILGORE v. RICH.

1891. 83 Me. 305, 22 Atl. 176.

PETERS, C. J.—The jury found that at the request of the defendant, then an infant, the plaintiff paid for him a board-bill which he had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessaries. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessaries has always been accepted as true doctrine, which are these: "Necessary meat, drink, apparel; necessary physic, and such other necessaries, and likewise his good teaching or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial that an infant, being liable to one per-

son for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the case satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In Clarke v. Leslie, 5 Esp. 28, it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessaries would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great. Swift v. Bennett, 10 Cush. (Mass.) 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill, and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So in Conn v. Coburn, 7 N. H. 368, a person who signed an infant's note given for necessaries, as a surety, was allowed, after payment of the note, to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. Randall v. Sweet, 1 Denio (N. Y.) 460, is precisely in point in the present case.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessaries with it. "But," says Mr. Bishop, "one who pays money at his (infant's) request to a third person for necessaries can recover it." Bish. Cont., § 914. The difference is between lending or paying. Mr. Wharton (Whart. Cont., § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessaries stands in the position of the tradesman who furnishes the necessaries. In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it; and there really is no good reason to defeat his claim as it is here presented.

§ 42 (B)—What the Term Includes.

STRONG v. FOOTE.

1875. 42 Conn. 203.

PARDEE, J.—In suits against minors, instituted by persons who have rendered services or supplied articles to them, the term "necessaries" is not invariably used in its strictest sense, nor is it limited to that which is requisite to sustain life, but includes whatever is proper and suitable in the case of each individual, having reference to his circumstances and condition in life.

The defendant applied to the plaintiff for relief from pain and the prevention of its recurrence; he, finding the cause in the defendant's decaying and neglected teeth, immediately began the work of relief and repair, and continued the same from time to time during a period of six weeks, until its completion. It was necessary for the preservation of the teeth and the charge therefor is reasonable in amount. In view of the circumstances of this defendant, we have no hesitation in saying that the services are within the legal limitations of the word "necessaries."

The teeth upon inspection disclosed their condition to the plaintiff; he could see that they had been neglected and were decaying; and the record does not reveal any effort or intention even on the part of the guardian to repair or preserve them.

Again, friends of the defendant in New Haven had twice previously taken him to the plaintiff for dental services, for which bills had been made out in his name, and had been paid, his guardian furnishing the money without warning or objection to the plaintiff. These acts on the part of the defendant and his guardian rendered it unnecessary that the plaintiff should have instituted an inquiry as to a guardianship over the defendant, before performing these last services, as a pre-requisite for a recovery in this suit, the work being necessary to meet an unsupplied want. Davis v. Caldwell, 12 Cush. (Mass.) 512; Brayshaw v. Eaton, 7 Scott 187; Dalton v. Gibbs, 7 Scott 117; 2 Greenleaf on Evidence, § 366.

There is no error in the judgment complained of.

MIDDLEBURY COLLEGE v. CHANDLER.

1844. 16 Vt. 683.

ROYCE, J.— * * * An infant may bind himself for necessaries. And the reason anciently assigned was, that without this power he might be exposed to perish of want. But though this was the alleged ground on which the infant's obligation was placed, yet the law

has never limited its definition of the term necessaries to those things which are strictly essential to the support of life,—as food, clothing, and medicine in sickness. The practical meaning of the term has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances. Hence a good common school education, at the least, is now fully recognized as one of the necessaries for an infant. Without it he would lack an acquisition which would be common among his associates, he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is moreover essential to the intelligent discharge of civil, political, and religious duties.

But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them. * * *

JOHNSON v. LINES.

1843. 6 Watts & S. (Pa.) 80.

GIBSON, C. J.—The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessaries, but which ill deserve the name. Their account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessaries when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three Bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket-money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessaries. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the

common law on the subject be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man—which fit him for useful life, or send him to an untimely grave; and public policy demands that they who deal with such a customer, should do so at their peril. This enormous bill was run up at one store; and what other debts were contracted for supplies elsewhere, we know not; but let it not be imagined that the infant's transactions with other dealers did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson, in Burghart v. Angerstein, (6 Car. & P. 700), "you may look at the bills of the other tradesman by whom the defendant was also supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessaries suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessaries proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril. * * *

McCARTY ET AL. v. CARTER.

1868. 49 Ill. 53.

PETITION to establish a mechanic's lien for work done and materials furnished under a contract with a minor for the improvement of his property.

LAWRENCE, J.— * * * The lien in this class of cases arises from work done or materials furnished under an obligatory contract, and if the contract ceases to be binding the lien necessarily fails. An infant is not bound by his contract, except in certain cases, to which the erection of a building for rent does not belong. A conveyance or mortgage by him of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property, indirectly, by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly attained his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither

in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age. * * *

RYAN v. SMITH.

1896. 165 Mass. 303, 43 N. E. 109.

KNOWLTON, J.—The only question in this case is whether the judge should have ruled, at the request of the defendant, that the articles purchased by the plaintiff were necessaries. They were a barber's shop and chair, and divers other articles of furniture designed to be used in furnishing a barber shop. The plaintiff was a minor, and he had no means of support, except what he earned. The law does not contemplate that a minor shall open a shop and become a trader, or the proprietor of a business which involves the making of a variety of contracts. This has long been settled by the authorities. Tupper v. Caldwell, 12 Met. (Mass.) 559; Mason v. Wright, 13 Met. (Mass.) 306; Merriam v. Cunningham, 11 Cush. (Mass.) 40; McCarthy v. Henderson, 138 Mass. 310; Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; Wallis v. Bardwell, 126 Mass. 366. It is clear that the articles in question were not necessaries. * * *

HOUSE v. ALEXANDER.

1886. 105 Ind. 109, 4 N. E. 891.

ELLIOTT, J.— * * * The theory of the third paragraph of the appellant's answer is that the horse bought of him was a necessary, for the reason that the appellee was engaged in farming, and needed the horse in order to successfully carry on his business. This theory is unsound. The law does not encourage persons to engage in business during nonage, but, on the contrary, its policy is to keep infants from engaging in business until they have attained full age, and upon this ground it is uniformly held that articles purchased for business purposes, whether that of agriculture or commerce, cannot be deemed necessaries. This is the law, as the courts declare, even though the infant depends upon his business for support. Lowe v. Griffith, 1 Scott 458; Latt v. Booth, 3 C. & K. 292; Mason v. Wright, 13 Met. (Mass.) 308; Merriam v. Cunningham, 11 Cush. (Mass.)

40; Decell v. Lewenthal, 57 Miss. 331; Grace v. Hale, 21 Tenn. 28; 1 Rol. Abr. 729; 2 Cro. 494. Horses are not necessaries. The court affirmed this general rule in Price v. Sanders, 60 Ind. 30, saying: "But it has been pithily and happily said that necessaries do not include horses, saddles, liquors, bridles, pistols, powder, whips and fiddles." A verdict awarding compensation against an infant for the hire of horses and gigs was set aside, in Harrison v. Fane, 1 Man. & G. 550, as perverse. In Wharton v. MacKenzie, 5 Q. B. 606, Coleridge, J., very strongly declares that horses are not necessaries. The case of Hart v. Prater, 1 Jur. 623, cannot be justly considered as an exception to the general rule, for, although it was there held that a horse was a necessary, it was so because the infant had been directed to use one by his medical adviser, Sir Benjamin Brodie. In such a case as that, it may well be that a horse is a necessary, in the same sense that medicine and medical services are necessaries. * * *

CRAFTS v. CARR.

1902. 24 R. I. 397, 53 Atl. 275.

RODGERS, J.— * * * There is a class of cases allowing counsel fees as necessaries for an infant, where the cases in which the services were rendered affected the infant's personal relief, protection, or liberty, which, it seems to us, more closely analogize the case at bar than those relating merely to property rights. Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151, was a case where a female infant was seduced and got with child under a promise of marriage. The seducer afterwards refused to marry her, and she was left in a state of destitution and suffering, her father having turned her out of doors. Thereupon she applied to an attorney to bring suit for her for the breach of the promise of marriage. He did so, and it was afterwards settled by the marriage of the parties. After the marriage the attorney sued the husband and wife for his services. The decision was that if the services were necessary for the personal relief, protection, and support of the female defendant, the action might be maintained; and the court refused to disturb the jury's verdict for the plaintiff. * * *

In Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160, the plaintiff sued an emancipated infant for services rendered him as attorney in defending him in a bastardy proceeding. The court said, *inter alia:* "We think it must be held that an infant is liable for the services of his attorney in defending him against a bastardy proceeding. This may, it is true, sometimes subject him to larger liabilities than he would incur by making no defense, and procuring his liberty by ap-

plying for a discharge from imprisonment after he had been found chargeable; but it is to be presumed that he is innocent until he is proved to be guilty. A bastardy proceeding, though held to be a civil action, can only be sustained upon the ground that the defendant has committed a criminal offense. His good name is at stake, as well as his property, if he has any or ever acquires any,—for a judgment rendered against him will be valid, whether he is or is not liable to pay his attorney; and, besides, if he is found chargeable, the court may not release him upon satisfactory evidence of his inability to comply with the order. * * *

In Askey v. Williams, 74 Texas 294, 11 S. W. 1101, 5 L. R. A. 176, the question was as to the liability of an infant to an attorney for services rendered the infant, at his request, in defending him when indicted for stealing cattle. The court said: "The contracts of an infant for necessaries are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant when he is charged by an indictment with crime. His life or his liberty and reputation are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suitable to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare. It has accordingly been held that reasonable attorney's fees in defense of a criminal action brought against an infant are necessaries." * * *

A court of equity may allow reasonable compensation for the services of counsel in securing or protecting the minor's estate. Epperson v. Nugent, 57 Miss. 45; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372.

McKANNA v. MERRY.

1871. 61 Ill. 177.

THORNTON, J.—In 1864, Kate Feehan, since intermarried with McKanna, accompanied appellee and wife on a trip from Illinois to California, by water. Her passage money was paid by appellee. Kate was then an infant, and under the control of her guardian, who was desirous that she should attend school for another year, and disapproved of the trip.

The only proof as to the value of her estate is, that it consisted of an undivided one-third of some realty, which, after her marriage, and a few years after the advancement of the money, was sold for $3,250.

There is no proof that this trip was necessary for her health, or that it subserved any purpose other than pleasure, or as company for the wife of appellee.

The court gave for appellee the following instruction:

"What are necessaries depends upon the circumstances of the case. If the going of defendant, Kate, to California was prudent and proper, under the circumstances proved, and the plaintiff advanced money necessary to take her there, and the same was for her benefit, then it is for the jury to determine whether such advances of money were for necessaries."

There is no positive rule by means of which it may be determined what are, and what are not, necessaries. Whether articles are of a class or kind for which infants are liable, or whether certain subjects of expenditure are necessaries, are to be judged of by the court. Whether they come within the particular class, and are suitable to the condition and estate of the infant, is to be determined by the jury as matter of fact. For example, suppose this trip had been to Europe, involving, in time, several years, and an expenditure of thousands of dollars, would any court hesitate to decide that the money thus advanced did not constitute necessaries? Chitty on Con. 141a, note 2; 1 Parsons Con. 296; Beeler v. Young, 1 Bibb. (Ky.) 519; 1 Am. Leading Cases 248.

The court, in the instruction, merely informed the jury that, if the trip was prudent and proper, and that the money was for her benefit, then the jury must determine whether such advances of money were for necessaries. There was not a particle of proof to enable the jury to determine as to the propriety or impropriety, the prudence or imprudence of the trip, or that the advancement of the money was for the benefit of appellant.

Even if there had been such proof, the instruction was wrong. The court should have defined necessaries in some manner. Blackstone defines necessaries to be "necessary meat, drink, apparel, physic," and says that an infant may bind himself to pay "for his good teaching and instruction, whereby he may profit himself afterwards." The articles furnished, or money advanced, must be actually necessary, in the particular case, for use, not mere ornament, for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants.

The courts have generally excluded from the term "necessaries," horses, saddles, bridles, pistols, liquors, fiddles, chronometers, etc. It has been held, however, that if riding on horseback was necessary to the health of the infant, the rule was different.

We have been referred to no case, and, after a thorough examination, have found none, in which it has been held that moneys advanced for traveling expenses, under the circumstances of this case, were necessaries.

The court should have instructed the jury as to the classes and gen-

eral description of articles for which an infant is bound to pay. Then the jury must determine whether they fall within any of the classes, and whether they are actually necessary and suitable to the estate and condition of the infant.

It may be proper to advert to another principle. The infant had a guardian, who had charge and management of her estate, which consisted entirely of realty. It was the duty of the guardian to superintend the education and nurture of his ward, and apply to such purpose, first, the rents and profits of the estate, and next the interest upon the ward's money. This is the positive command of the statute, and he was liable, upon his bond, for non-compliance. He was the judge of what were necessaries for his ward, if he acted in good faith.

A third party had no right to intervene and usurp the rights and duties of the guardian. Even if the money paid was, in some sense, for the infant's benefit, and the trip was prudent and proper, yet, if the guardian, in good faith, and in the exercise of a wise discretion, and with reference to the best interests of his ward, supplied her wants and contributed means suitable to her age and station in life, and in view of her estate, then the infant would not be liable for the money, as necessaries. Beeler v. Young, *supra;* Kline v. L'Amoureux, 2 Paige (N. Y.) 419; Guthrie v. Murphy, 4 Watts (Pa.) 80; Wailing v. Tall, 9 Johns. (N. Y.) 141. * * *

Judgment reversed and the cause remanded.

SINKLEAR v. EMERT.

1856. 18 Ill. 63.

CATON, J.—Here was a special agreement, made by the father of the infant, to pay for his board. In pursuance of that agreement, the plaintiff below boarded and took care of the infant two years; and now, on the failure of the father to pay for it, he sues the child, for the purpose of recovering out of the infant's estate. There can be no pretense for charging the infant, or his estate, with the amount. The credit was given to the father, and not to the infant. It is not like the case of necessaries, furnished an infant on his credit. Even waiving the question of infancy, the father alone would be liable, on this special contract, for boarding and taking care of the defendant below.

SAMS v. STOCKTON & CURTIS.

1853. 14 B. Mon. (Ky.) 232.

SIMPSON, J.— * * * The defendant relied upon the fact that he was an infant when the account was created by him; and the plaintiffs insisted that he was liable for the articles purchased, notwithstanding his infancy, because they were necessaries.

It was proved that the defendant, at the time he purchased the goods in the plaintiff's account, was in his twenty-first year; that he was about to be, and was afterwards married, and that the goods so purchased by him were for his wedding suit. It was also proved that the articles purchased were suitable for his condition in life, and necessary for the purpose for which they were intended to be applied; that the defendant's father, who resided in the county, was a man of good estate and position in life, and that the defendant had, although an infant, for a considerable period of time traded and purchased goods for himself.

It is contended that the defendant was not liable for these goods, for two reasons: First, that they cannot be considered as necessaries, and in the second place, if necessaries, he was not responsible for them, but his father was.

If an infant marries, such clothing as is usually worn on such occasions, by persons in his situation and condition in life, certainly come under the description of necessaries. They might not be necessary for ordinary purposes, but they become necessary in consequence of the use to which they are to be applied; and as the defendant had been trading and doing business for himself, and purchased these goods upon his own credit, and agreed either expressly or impliedly to pay for them, he was individually liable for the price of them.

The judgment rendered against him by the circuit court is therefore affirmed.

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§ 42 (C)—Necessaries for Wife and Children.

THE PEOPLE v. MOORES.

1847. 4 Denio (N. Y.) 518.

[Reported herein at p. 300.]

PERSONS OF UNSOUND MIND.

§ 43.—General Rule.

LILLY v. WAGGONER.

1862. 27 Ill. 395-396-7.

WALKER, J.— * * * It may be truly said, that there are few questions which present greater difficulties in their solution, than this of insanity. It assumes such a variety of forms, from that of the raving madman, to the monomaniac; from total dementia, to that of scarcely perceptible insanity, that it has almost been denied, that any person is perfectly sane, on every subject. But the law only regards it, when it renders the subject *non compos mentis,* or that condition of the mental faculties exists, which renders the subject incapable of acting rationally in the ordinary affairs of life. It is that degree of mental derangement which renders the person affected incapable of understanding the effect and consequences of his acts. It need not be of that total derangement, or rather obliteration of the faculties, which prevents the party from reasoning upon all subjects. Nor yet the want of power, at all times, upon correct premises, to arrive at accurate conclusions, but it is that want of power, which prevents a person from reasoning, or understanding the relation of cause and effect.

Persons of equal natural mental capacity, from difference in education, pursuits, and opportunity, manifest different degrees of mental vigor. The law has never required the high order of reasoning powers that mark the gifted, or a large portion of the human family would be thus deprived of the legal capacity to transact their own business. But if the person manifest an ordinary degree of intelligence and judgment or even less, in reference to his business pursuits, and especially upon the subject in dispute, at the time of the transaction, it is all that is required.

A person may be lunatic and yet have lucid intervals. And the law has at all times held, that a contract entered into, during a lucid period, is valid, whilst those made during a fit of insanity may be avoided. The reason is obvious, as a contract to be binding, must receive the assent of the parties. Not the mere formal assent, but the agreement of a mind capable of comprehending the nature of the transaction. Where one of the parties is *non compos mentis,* he has not entered into the agreement, because his mind has not comprehended the nature of the transaction, or the effect of his act. He lacks the mental capacity to understandingly give his assent to the transaction, whilst in the lucid interval, his mind acting with judgment, has understood the force and effect of his act. * * *

SANDS v. POTTER.

1897. 165 Ill. 397, 46 N. E. 282.

BAKER, J.—* * * The principal ground of defense relied on at the trial was that the contract of January 30, 1891, was void, because entered into by appellant while he was insane or without mental capacity sufficient to make a valid contract. The fact that appellant at that time had sufficient mental capacity to execute the contract is conclusively established by the verdict of the jury and the judgments of the courts below. A contention, however, is made that the verdict was induced by erroneous instructions of the trial court given in that behalf at the instance of the court below. One of them told the jury that to impeach the written contract for want of mental capacity it must be shown, by a preponderance of evidence, that "the defendant, at the time he executed it, had such a degree of mental weakness that he was incapable of understanding what he was doing and unable to comprehend and understand the terms and effect of the contract, or that the same was procured by some undue influence." Another of them read as follows:

"The jury are further instructed, that although they may believe, from the evidence, that either before, at the time or after the making of the written contract in question defendant had insane delusions on some subjects, yet if the jury further believe, from the evidence, that such delusion was in no way related to the plaintiff or the subject-matter of the contract here in question, and that in making such contract defendant was in no means influenced thereby, but that in the making of said contract he possessed mind, memory and senses sufficient to know and comprehend the scope, force and effect of that contract, then he was mentally capable of making said contract, and the jury should so find."

The criticism made upon these instructions is, that they did not explicitly state that defendant must have had "sufficient mental capacity to protect his own interests in executing the contract." We are not aware that there is any fixed formula of words in which the mental capacity or incapacity of a person to make a contract must be expressed. It is true that in the case of Lindsey v. Lindsey, 50 Ill. 79, in passing upon the question of the mental imbecility that would invalidate a contract, this court said, that "in the absence of undue influence there must be such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests," and that like language is used in some subsequent cases. But in the Lindsey case it is also said that the contract cannot be impeached "if the contracting party still retains a full comprehenson of the meaning, design and effect of his acts." In Miller v. Craig, 36 Ill. 109, it is said that mere mental weakness will not authorize a court to set aside a contract if such weakness does not amount to inability to

comprehend the contract and is unaccompanied by evidence of imposition or undue influence, and that such is the tenor of all the authorities. Like language is used in Willemin v. Dunn, 93 Ill. 511. In Kimball v. Cuddy, 117 Ill. 213, the words, "a full comprehension of the meaning, design and effect of his acts," are used as designating the degree of mental capacity existing where the contract is valid, and the expression, such "mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests," is used in designating the degree of incapacity required to render the contract invalid.

It is difficult to apprehend how one can "comprehend and understand the terms and effect of the contract," or in making it, possess "mind, memory and senses sufficient to know and comprehend its scope, force and effect," without being "mentally competent to protect his own interests." This latter phraseology is used in several of the instructions given at the instance of appellant. The legal principle involved in the case is embodied in each set of the instructions—as well those given on motion of appellee as those given on motion of appellant, and the jury had the benefit of the rule of the law expressed in both forms of phraseology. It was not error to give the instructions asked by appellee. * * *

MILLER v. CRAIG.

1864. 36 Ill. 109.

BREESE, J.—The scope and object of the bill filed in this cause, was to set aside a deed conveying certain real estate, on the ground of misrepresentation by the grantee and the mental incapacity of the grantor.

We have looked with the greatest care through the testimony in this record on these points, and have not been able to discover any fraud or imposition whatever practiced upon the complainant. Nor will the evidence justify the conclusion that the complainant was too ignorant or too weak in his understanding to make valid contracts. On the contrary, the proof is full that he was a hale, hearty man, was in the constant habit of making his own trades and managing his own affairs, of dealing with the public at large with ordinary prudence and sagacity. No such weakness of mind or incapacity is shown as will warrant a court of equity to rescind an executed contract. In the case of Aiman v. Stout, 42 Pa. St. 114, it was held that mere mental weakness will not authorize a court of equity to set aside an executed contract, if such weakness does not amount to inability to comprehend the contract, and is unaccompanied by

evidence of imposition or undue influence; and such is the tenor of all the authorities on this point.

This court said, in the case of Van Horn v. Keenan, 28 Ill. 448. where a party capable of taking care of his own interest, makes a bad or losing bargain, the law will not assist him, unless deceit has been practiced against which ordinary prudence could not protect him.

Now upon the question of fraudulent misrepresentation, imposition or deceit. Of these, there is really no testimony. The appellant in endeavoring to effect a trade with appellee, used no more artifice than is usual and allowable when a party wishes to dispose of property, real or personal. He has a right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of the opposing party. This is the daily practice, and no one has ever supposed that such boastful assertions, or highly exaggerated description, amounted to fraudulent misrepresentation or deceit. These parties were dealing at arm's length and on equal grounds, and their own judgments were to be their guide in coming to conclusions. It is proved that complainant had the fullest opportunity, of which he availed, to examine the property, and afterwards moved into it. The defects were pointed out to him by his wife before he executed the deed to appellant.

These defects, the witnesses say, were plainly visible on entering the house. They needed no great scrutiny to be discovered. The conclusion is irresistible that appellee made the trade, being perfectly competent to make it, with a knowledge of the condition of the property for which he contracted, its quality, suitableness to his purposes—in short, in every particular which could form a portion of the consideration for the contract. The house was wanted for a boarding house, for which it was suitable and well calculated. Appellee may have paid too much for it. He may have made an injudicious bargain, and we think he did. After the gloss and novelty of the new possession has worn off, he, very naturally, repents and seeks to get his better house back and rescind the contract *in toto*. We know of no rule or equity that will permit this. The decree of the Circuit Court is reversed and the bill dismissed, there being no equity in it.

Decree reversed.

ALLIS v. BILLINGS.

1843. 6 Met. (Mass.) 415.

DEWEY, J.—The question raised in the present case is, whether the deed of one who is insane, at the time of the execution thereof, is void absolutely, or merely voidable.

The term "void," as applicable to conveyances or other agree-

ments, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable"; it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms "void" and "voidable," in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term "void" can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification.

This question, then, arises: Is the deed of a person *non compos mentis* of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaries, vol. II, p. 291, states the doctrine thus: "Idiots, and persons of non-sane memory, infants, and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable but not actually void." Chancellor Kent says, "by the common law, a deed made by a person *non compos,* is voidable only, and not void." 2 Kent Com. (4th Ed.) 451. In Wait v. Maxwell, 5 Pick. (Mass.) 217, this court adopted the same principle, and directly ruled that the deed of a *non compos,* not under guardianship, was not void, but voidable. Such a deed conveys a seisin to the grantee, and the deed, to that extent, is valid until, by entry or action, the same is avoided. Mitchell v. Kingman, 5 Pick. (Mass.) 431, is to the like effect. In Seaver v. Phelps, 11 Pick. (Mass.) 305, the contracts of insane persons are noticed as contracts not absolutely void, but voidable.

It may seem somewhat absurd to hold that a deed should have any effect, when wanting in one of the essential elements of a valid contract, viz., that of parties capable of giving an assent to such contract. But this objection as strongly applies to cases of deeds executed by infants, who are alike wanting in capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it, to some present purposes, effectual, and susceptible of complete future ratification, is well settled and understood as to infants who enter into contracts; and it will be found that there is a common principle on this subject, alike applicable to the inability of a contracting party, arising from lunacy or infancy. The civil and the common law writers group together idiots, madmen, and infants, as parties incapable of contracting for want of a rational and deliberate consenting mind. 1 Story on Eq., § 223, and authorities there cited.

It is true that the rule of the common law, as held at one time, seemed to sanction, in one particular, a most unwarrantable distinc-

tion between the cases of deeds made by persons *non compos,* and those made by infants; holding that the former could not be avoided by the party, upon the ground that no man of full age should be admitted to stultify himself, although it allowed privies in blood, or privies in representation, after the death of the *non compos,* to avoid the deed, on the ground of incapacity in the grantor. This distinction has not been adopted by our courts. On the contrary, we hold that such conveyance by one *non compos mentis* may be avoided by himself, as in the case of an infant grantor. This principle was directly recognized in the case of Mitchell v. Kingman, 5 Pick. (Mass.) 431. Indeed, the English rule has, in modern times, been often questioned in England; and in the courts of our sister states, it has received little if any sanction. 1 Story on Eq., § 225, and cases there cited. * * *

BLINN v. SCHWARZ.

1904. 177 N. Y. 252, 69 N. E. 542.

VANN, J.— * * * I think the true rule was suggested by the great English commentator, when he said that "idiots and persons of non-sane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only, for their conveyances and purchases are viodable, but not actually void." 2 Black. Com. 291. Chancellor Kent uses similar language (2 Kent's Com. 451), and other writers lay down substantially the same rule. Mr. Wharton, after a full discussion of the subject, says that "the true rule is that a voidable deed is capable of ratification, and if a grantor, when insane, makes a deed, and should afterwards, in a lucid interval, well understanding the nature of the instrument, ratify and adopt it as his deed, as by receiving the purchase money due under it, this would give effect to it, and render it valid in the hands of the grantee." The learned author cites many authorities in support of this position. 1 Wharton's Law of Contracts, § 107, p. 138. In Bishop on Contracts, §§ 873 and 874, it is said: "Plainly, in justice, the same party ought ordinarily to be holden, whether he knew of the insanity or not, if the other or his representative so elects. The authorities on this point may be conflicting, but such is believed to be the better doctrine. This last would make the contract voidable, whatever the courts should hold its other consequences to be. * * * In general, this contract, like an infant's, may be ratified or disaffirmed by the insane party's guardian or committee, or by himself during a lucid interval or on becoming sane, or after his death by his proper legal representative." In Clark on Contracts, p. 268, it is laid down "as a general or almost universal rule"

that the contracts of an infant or insane person "are not void, but simply voidable at his option, and they are binding on the other party if he elects to hold him." In Lawson on Contracts, § 161, the rule is stated in this language: "The contract of an insane person is voidable at his option, and therefore one may prove in avoidance of his contract that he was *non compos mentis* when he entered into it, although a similar privilege is not allowed to the party with whom he contracted. The insanity, to avoid the contract, must be an absolute incapacity to understand the effect of the act; and therefore mere weakness of mind, or partial insanity or monomania, unconnected with the subject-matter of the contract, is not sufficient, though a moderate degree of incapacity may be sufficient where the transaction is accompanied with fraud, imposition, or duress. Where the person has been adjudged a lunatic and placed under guardianship, contracts made by him thereafter are absolutely void, unless the guardianship has been abandoned, or no guardian has been appointed, or the guardian appointed has resigned." We will close our quotations with the following from Pollock's Principles of Contract, p. 81: "The contract of a lunatic or drunken man, who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests, is not void, but only voidable at his option; and this only if his state is known to the other party." * * *

BURNHAM ET AL. v. KIDWELL.

1885. 113 Ill. 425.

SCHOLFIELD, J.—The question whether a deed made by an idiot or lunatic, before the fact has been found by a jury and a conservator appointed, is void, or only voidable, can hardly be regarded as open to argument, in this state. The first section of our statute in relation to idiots, lunatics, etc., provides for the impaneling of a jury to find whether a person is an idiot or lunatic, and requires the court to appoint a conservator, when he shall be so found. The 14th section of the same statute declares that "every note, bill, bond, or other contract, by any idiot, lunatic, etc., * * * made after the finding of the jury, as provided in section 1 of this act, shall be void as against the idiot, lunatic, etc., * * * and his estate." But by the next section (section 15) it is provided: "Every contract made with the idiot, lunatic, etc., * * * before such finding, * * * may be avoided, except in favor of the person fraudulently making the same." (Rev. Stat. 1874, chap. 86.) Since a deed is but one form of a contract, it is necessarily included in the word "contract,"

as here used. 1 Chitty on Contracts (11th Am. ed.) 4; Bishop on Contracts, sec. 14.

Counsel for appellee, however, quote from section 1, chapter 30, of the Revised Statutes of 1874, to the effect that every deed, etc., not procured by duress, but signed, sealed, etc., the maker being of full age, sound mind, and discovert, shall be sufficient, etc., and insist that this, by implication, declares that one not of sound mind cannot convey. This section simply declares that certain things shall constitute a good deed. It does not negative that a good deed can in no other wise be made. It places idiots, lunatics and minors in the same class,—that is, excludes each,—and yet nothing is better settled by the adjudications of this court than that the deeds of infants are not void, but voidable only (Keil v. Healey, 84 Ill. 104, Cole v. Pennoyer, 14 *id.* 158, and Blankenship v. Stout, 25 *id.* 132), and, necessarily, the implication contended for is not warranted. Moreover, in Scanlan v. Cobb, 85 Ill. 296, we expressly held that such a deed is voidable. Numerous decisions of other courts, not referred to in the opinion in that case, might be referred to in support of the doctrine, but it cannot be necessary. The statute itself so declares, and that is conclusive. * * *

ALLEN v. BERRYHILL.

1869. 27 Iowa 534.

DILLON, C. J.— * * * The peculiarity of the case now under consideration consists in the fact that the representative of the party alleged to be insane, and with whom the contract was made, is the party seeking to have it enforced. It is the sane party to the contract that makes defense, and the defense is that the other party to the contract was totally insane at the time it was entered into. * * *

This circumstance is regarded as important, and as distinguishing the case from those in which it is the insane party who pleads his incapacity and seeks to prevent the sane party to the contract from enforcing it against him.

It is the opinion of the court, that justice and sound policy concur in requiring it to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the sane party merely to show that the other party was *non compos mentis* at the time the contract was made.

There are obvious reasons, founded on the justice and propriety of protecting those whom the visitations of providence have incapaci-

tated from protecting themselves, against contracts which are discovered to be prejudicial to their interests.

Their incapacity to contract is a shield which the law places in their own hands to protect them, not a sword in the hands of others with which to cut down their rights.

If a person who is of unsound mind, or who is afterward shown to have been of unsound mind, shall chance to make a contract which is really advantageous to him, can a satisfactory reason be given why he should not have the right to enforce it?

No such reason occurs to us.

The reason advanced by the appellant is, that in law two minds must concur to make a contract; that where one of the parties is insane there are not two minds capable of contracting; hence there is and can be no contract; and, therefore, no liability by either party to the other thereon.

It cannot be denied that there is to the legal mind, prone to draw and often delighting to indulge in refined and acute distinctions, much that is plausible in the ground here assumed. But, after all, is that ground really tenable?

As applied to this case, the defendant says to the plaintiff: "You cannot recover because you have no contract." The plaintiff replies, "But I have a contract: here it is: it consists in your own notes." Now what does the defendant rejoin: "I admit you have my notes, but, though signed by me, they are not, in legal contemplation, my act, because you had no power to agree to take them."

Is this rejoinder not subtle rather than substantial? In fact, the plaintiff has the promise or contract of the defendant, and, if fairly obtained, it ought to be no defense to a sane defendant, that the plaintiff's mind was not sound at the time the contract was made.

The objection relied on by the defendant is one of the many difficulties which have arisen out of the use of the words "void" and "voidable," and the uncertain extent of meaning attached to them.

The conclusion which we reach derives a very strong support in the analogies of the law. Thus, if an infant make a contract with one of full age it may, as is well known, be enforced by the infant against the adult, but not by the adult against the infant, if the latter pleads (and the plea is purely personal) his disability.

So also the same doctrine applies to the disability of coverture. And this court has decided, that, while, as a general rule, it is true that the discharge of a principal releases a surety, yet it holds that "where a person *sui juris* becomes surety for a married woman, a minor, or other person incapable of contracting," the surety is bound, notwithstanding a successful plea of disability on the part of the principal. Jones v. Crosthwaite, 17 Iowa 393, 396, and cases cited.

Another illustration: delivery is essential to a deed, and acceptance essential to delivery, and there can be no acceptance without mental assent. This is a general rule of law, and yet a deed made to an in-

fant or to a lunatic, although there be no mental capacity capable of understanding the nature of the instrument, is valid. The law supplies or presumes the requisite assent to an act beneficial to the party; or it dispenses with it.

So here. Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party to set up and sustain this objection.

The subject might be further elaborated, but it is scarcely needful to do so. * * *

DEXTER v. HALL.

1872. 15 Wall. (U. S.) 9.

STRONG, J.— * * * The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. * * * It has repeatedly been determined that a power of attorney made by an infant is void. Saunderson v. Marr, 1 H. Bl. 75; 2 Lil. Abr. 69; 1 Am. L. Cas. 248, 249. So it has been decided in Ohio (Lawrence v. McArter, 10 Ohio 37); in Kentucky (Pyle v. Cravens, 4 Litt. (Ky.) 17); in Massachusetts (Whitney v. Dutch, 14 Mass. 462); and in New York (Fonda v. Van Horne, 15 Wend. (N. Y.) 636). In fact we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable. * * *

See also Clay v. Hammond, 199 Ill. 380, 65 N. E. 356.

MENKINS v. LIGHTNER.

1857. 18 Ill. 282.

SCATES, C. J.— * * * Courts will protect the party against his own acts done under a state of insanity, at his instance, or that of his conservator or representatives, although he has brought on that condition by drunkenness. Wigglesworth v. Steers et al., 1 Hen. and Munf. (Va.) 70; 1 Parson's Cont. 310, 311 and notes; 24 Vt. 224. * * *

WIREBACH'S EXECUTOR v. FIRST NAT. BANK.

1881. 97 Pa. St. 543.

TRUNKEY, J.— * * * In most if not all cases where an insane person has been held answerable, as if his contract were binding, he received and enjoyed an actual benefit from the contract.

The question now presented is: Will an action lie on the accommodation endorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in Moore v. Hershey, 9 Norris (Pa.) 196. There the action was by an endorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. Paxson, J., said: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

If the holder could recover against one who was insane when he endorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or endorses a note may, by his representative, plead his infancy as a complete defence. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder who may have given value to his endorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration; then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves, but it would be sorry protection, if one holding a valid note against a helpless man for four thousand dollars, could get it renewed for ten thousand dollars, and recover the full amount

of the renewal note. The consideration must be fair and conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain, and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or endorser, in fact, is a surety for the principal debtor, and when he is an infant or an insane person, he or his representatives may defend as in other forms of contract. We are not persuaded that commercial or public interest require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or endorser, is liable for the debt of another man. * * *

RONAN v. BLUHM.

1898. 173 Ill. 277, 50 N. E. 694.

BOGGS, J.— * * * The doctrine that a contract may not be rescinded by the court except the party in whose interest the rescission is awarded shall restore that which was received by virtue of the contract, is applicable, in general, only to contracts made by persons *compos mentis* and under no disability. Whether it is applicable, or, if applicable, to what extent it should be modified to meet particular cases where persons *non compos* have received money or property as the consideration for an agreement, has been much discussed by text writers and is the subject of many, not altogether harmonious, judicial decisions. The rule which seems to commend itself to our sense of justice, and which is supported by what we conceive to be the weight of authority, is that a completed contract of sale of lands by a grantor who is insane but has not been judicially declared insane, for a fair consideration in money or property, to a grantee who entered into the contract without fraudulent intent and without knowledge or notice of the disability of the grantor, will not be set aside in favor of the grantor or his representatives unless the purchase price be returned or the property parted with by the grantee be restored. (Scanlan v. Cobb, 85 Ill. 296; Boswell on Insanity, secs. 413, 414.) If the grantee, with notice of the incapacity of the insane grantor to manage his estate, invests such grantor with the possession of money or property in exchange for lands, and the said money or property, by reason of the mental incapacity of the grantor, is wasted and lost, or if the grantee, with such knowledge, obtains a conveyance of the lands from such a grantor for a consideration so inadequate as to be inequitable and to evince that it was his intention to take advantage of the infirmity of the grantor and to defraud him, such a grantee

would have no standing to invoke the equitable rule that "he who asks equity must do equity," and demand that under the operation of that maxim a court of equity should refuse to set aside the conveyance except upon the imposition of such terms as would amply protect him from any loss. Such a rule would be but to guarantee that although the attempt to fraudulently procure the property of an insane man might fail, yet the perpetrator of the attempt would be protected by law from any loss in the transaction. * * *

See also Eldridge v. Palmer, 185 Ill. 618.

McKENZIE v. DONNELL.

1899. 151 Mo. 461, 52 S. W. 222.

MARSHALL, J.— * * * Without reviewing the multitude of cases which the industry and research of the able counsel have collected in this case, we conclude that the right to avoid, upon equitable terms, a deed made by an insane person, cannot be defeated by a conveyance of the land to an innocent third person for value and without notice, nor can additional terms to the right to redeem be added by the grantee incumbering the property. To deny the right to avoid the deed because the property had passed into the hands of an innocent purchaser for value and without notice would, in effect, deny the right to avoid at all, and would nullify the beneficent protection which courts of equity throw around those who are so afflicted that they cannot protect themselves. It would be an easy matter for a grantee of an insane man to sell the property, pocket the proceeds, and look with indifference upon subsequent litigation, if by so doing he could convey a perfect title to any third person. It would be a queer law that, pretending to be a shield to the helpless, should thus put a sword in the hands of a person *sui juris* to help him wrest property from a person *non compos mentis* by such simple means. Adequate justice and complete equity are done when the insane man is required to restore the benefits he has received from the transaction, and there is neither right, law, nor morality which would require him to restore benefits which some one else has received from the land, but not from the insane man's contract. * * * Where an insane person is entitled to avoid a conveyance as between himself and his immediate grantee, he is also entitled to avoid it as between himself and any grantee or mortgagee holding under his grantee; and the terms to be imposed are the benefits that flowed from the grantee to the insane man, and not such benefits as the insane man's grantee received from any other person to whom he

granted or mortgaged the land. Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512; Hull v. Louth, 109 Ind. 315, 10 N. E. 270; Hovey v. Hobson, 53 Me. 451; Chew v. Bank, 14 Md. 318; Society v. De Lashmutt, 67 Fed. 399; Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276. As was said in Hovey v. Hobson, 53 Me. 451, the *bona fide* grantee of the grantee of an insane person must rely on the covenants of his deed for restitution, and it is not necessary that he should be placed *in statu quo* by a plaintiff in a suit to vacate the conveyance. * * *

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§ 44.—Contract of Monomaniac.

BURGESS v. POLLOCK.

1880. 53 Iowa 273, 5 N. W. 179.

ACTION in equity to set aside a deed executed to the defendant by plaintiff's father, Alexander Pollock, who has, since the execution of the deed, died intestate. The petition avers that the grantor at the time of its execution was insane. Decree for plaintiff. Appeal.

ADAMS, C. J.— * * * It is not important that we should set out the evidence in full, or enumerate the witnesses upon each side. It is sufficient to say that we have all read the evidence separately, and have all separately come to the conclusion that Pollock was laboring under some insane delusions upon the subject of religion, although they were not of a very marked character. Upon all other subjects it appears to us that he was sane. The evidence is overwhelming that he transacted his business with prudence and good judgment, and was respected and esteemed by his neighbors. There is certainly nothing in the transaction complained of indicating insanity. On the other hand it appears to have been dictated by prudence and forethought.

We have, then, the question as to whether the deed of a monomaniac can be set aside on account of a monomania, where there is no reason to believe that there was not the full exercise of reason and judgment, on the part of the grantor, in the execution of the deed. In our opinion it cannot. Neither contracting nor testamentary capacity requires entire soundness of mind. In 1 Parsons on Contracts, 383, the author, speaking of what will incapacitate a person for making a contract, says: "There must be such a condition of insanity or idiocy as from its character or intensity disables him from understanding the nature and effects of his acts." Citing Ex parte Nottington, 1 Ala. 400. Upon the subject of partial insanity or monomania, as affecting testamentary capacity, see Potts v. House, 6 Ga. 324; Townsend v. Townsend, 7 Gill. (Md.) 10;

Boyd v. Eby, 8 Watts (Pa.) 71; James v. Langdon, 7 B. Mon. (Ky.) 193.

In Boyce v. Smith, 9 Gratt. (Va.) 704, a question arose which was substantially the same as that involved in the case at bar. It was held that a monomaniac might make a valid contract where the monomania did not extend to the subject out of which the contract grew.

In our opinion the court erred in setting the deed aside.

Reversed.

BOND v. BOND.

1863. 7 Allen (Mass.) 1.

IN this case the judge ruled that if the insane delusion was such that the party, though knowing that she was making a deed and what its legal effect would be, yet was rendered entirely indifferent to property by an insane delusion that she was about to perish, or that others who would be affected injuriously were about to perish, so that she was incapacitated from a rational care for her interest or theirs, then the deed may be avoided. Exceptions.

BIGELOW, C. J.— * * * It is objected by the tenant that the ruling of the court as to the nature and degree of insanity which would be sufficient to invalidate a deed was erroneous in several particulars. But we cannot so regard it. It embraced all the essential elements which were necessary to constitute mental incapacity, as applied to the subject matter, and left the question to the jury to determine whether these elements were proved to have existed in the condition of the grantor's mind at the time she executed the deed to the tenant. If it appeared that she was affected with mental disease, which had culminated in a delusion that she and those who would inherit her property, or for whose pecuniary interest and welfare she would in the exercise of her reason have provided, were about to perish, and that thereby she was rendered indifferent to property and incapable of appreciating its uses and value, and had become reckless of or insensible to her own interests or the interests of those dependent upon her or connected with her, she certainly was not competent to make a valid disposition of her property by deed. Such an irrational and insane delusion would be directly connected with the act, and incapacitate her from understanding its nature or character, or the results which would flow from it. 2 Greenl. Ev., § 371a; 1 Jarman on Wills (4th Amer. ed.) 58; Shelford on Lunacy, 41 et seq., 296; Greenwood v. Greenwood, 3 Curt. Eccl. Appx. xxx, xxxi; White v. Wilson, 13 Ves. 89. The ruling of the court in substance embraced the true principle applicable to

the case, and, being put hypothetically, necessarily left to the jury to find whether the facts in proof concerning the mental condition of the grantor showed that she was at the date of the deed to the tenant, according to a just application of the principals, incompetent to make a valid conveyance of her property.

The remaining objection can be briefly disposed of. The tenant insisted and asked the court to instruct the jury that the grantor had ratified and affirmed the deed to him by receiving support from him after her restoration to sanity. The court instructed the jury in conformity to this request, with the qualification that such a ratification must be the intelligent act of the grantor, with a knowledge that she was receiving support under the contract arising from the acceptance by the tenant of her deed to him. We are at loss to see any plausible ground of objection to this instruction. It was in substance only an enunciation of the familiar and elementary principle that a party cannot be bound by an agreement to which he has never assented, or by an act done without any intent or purpose to affect or impair his rights.

Exceptions overruled.

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§ 45.—Contract of Lunatic in Lucid Interval.

LILY v. WAGGONER.

1862. 27 Ill. 395.

[Reported herein at p. 347.]

TRISH ET AL. v. NEWELL ET AL.

1871. 62 Ill. 196.

McALLISTER, J.— * * * On behalf of the complainants, the court, by the third instruction, directed the jury as follows:

"If the jury believe, from the evidence, that, on the 10th day of July, 1866, the deceased, Joseph Wing, was, by a stroke of paralysis, rendered entirely unconscious, and of unsound mind and memory to the extent defined in other instructions, the law presumes such unsoundness of mind to continue until the contrary is proven; and the burden of proof is on those now seeking to establish this will, to show affirmatively, and to the satisfaction of the jury, that said Wing subsequently, and before said alleged will was made, became of suffi-

ciently sound mind, and of a sufficiently rational and disposing mind at the time of the execution thereof, so that he could and did comprehend its motive and effect; and they must establish this by preponderance of proof, or the jury must find against the alleged will."

Exception was taken to this instruction by the defendants below, and the giving of it is assigned for error.

This instruction was wrong, and must have been very prejudicial to the opposite party. Greenleaf says, "Every man is presumed to be of sane mind until the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental—caused by the violence of disease. 1 Greenl. Ev., § 42.

In Hix v. Whittemore, 4 Met. (Mass.) 545, a similar instruction was given. The court, Dewey, J., delivering the opinion says:

"The force of presumption arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of their faculties." Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore, to be stated as au unqualified maxim of the law, "Once insane presumed to be always insane;" but reference must be had to the peculiar circumstances connected with the insanity of an individual, in deciding upon its effects upon the burden of proof, or how far it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former once established would require proof from the other party to show a restoration or recovery; and in the absence of such evidence insanity would be presumed to continue. But if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject of controversy, and not content himself merely with proof of insanity at an earlier period." The learned judge cited the case of Cartwright v. Cartwright, 1 Phillim. 100, where the same distinction was taken; Also 1 Williams on Executors 17, 18; Swinburne on Wills, part 2, § 3; 1 Collinson on Lunacy, 55; Shelford on Lunacy 275; 1 Hale P. C., 30.

It is no more a presumption of law that a person rendered unconscious and incapable of mental action by a stroke of paralysis will continue so for four months thereafter, than that he would so continue when the same effect was produced by a wound on the

head. Such a result might follow in either case, but the law does not presume that it would in either.

The instruction we have just been considering is so essentially erroneous, that, for giving it, we must reverse the decree. * * *

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§ 45 (A)—By Whom Contract May be Avoided.

COVINGTON v. NEFTZGER.

1892. 140 Ill. 608, 30 N. E. 764.

CRAIG, J.—This was a bill in equity, brought in the name of George W. Covington, by his next friend, Alexander Covington, to set aside a certain deed executed on or about the 1st day of March, 1871, by the said George W. Covington, which purported to convey certain premises therein described, situated in Pope county. The ground relied upon in the bill to set aside the deed is, that George W. Covington, at the time the deed was executed, was insane, and that he has remained insane ever since. A general demurrer was interposed to the bill, which the court sustained, and the bill was dismissed.

There is but one question of any importance presented by this record, and that is, whether the action was properly brought in the name of George W. Covington, the insane person, by his next friend. * * *

A person suing as next friend has no authority to bind the lunatic or his estate. He is a mere volunteer, clothed with no authority from any court. He may be liable for costs, but he does not control the lunatic or his estate in any manner whatever, and it would be a dangerous rule to hold that such a person might, at his own will or discretion, come into court for the purpose of impeaching a transaction in which he has no interest, as trustee or otherwise, and over which he has no control. The rule on this subject is well expressed in Dorsheimer v. Roorbeck, 3 C. E. Green (N. J. Eq.) 439, where it is among other things said: "The rule is a wise one. It should never be permitted that any volunteer should, by styling himself the next friend of an idiot, bring suit for him, and lose or jeopardize his rights."

We think it is well settled principle, that the person who brings a bill to avoid the deed of an insane person must have power to act for such person, and bind him and his estate. (Nichol v. Thomas, 53 Ind. 42.) The lunatic or insane person cannot do this himself. He has no disposing mind. He can do no binding acts himself, while his insanity continues. The lunatic may act on regaining his sanity, as held in Hovey v. Hobson, 53 Me. 451, or his heirs may act

after his death (Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236), or his committee, guardian or conservator may bring a bill during his insanity; but we do not think, after giving the subject such investigation as we have been able to do, that a bill can be maintained in the name of the lunatic or insane person, by his next friend. * * *

Judgment affirmed.

HOWE v. HOWE.

1868. 99 Mass. 88.

WELLS, J.— * * * The evidence that the grantor in a deed remembered what he had done, and afterward spoke of it and gave his reasons for it, and did not express any regret or dissent, was properly admitted as tending to prove that he understood his act at the time, and that he ratified it. The deed of an insane person is not void, but voidable. The maker of it, or his legal representative, may avoid it: or, when in possession of his full powers of mind, if he recovers his reason, he may affirm and ratify it. The contract is not a nullity, but, until disaffirmed, is binding; and the sane party cannot repudiate it. Allis v. Billings, 6 Met. (Mass.) 415; Arnold v. Richmond Iron Works, 1 Gray (Mass.) 434; Gibson v. Soper, 6 Gray (Mass.) 279. Any distinct and decisive act of recognition as a valid and subsisting contract is competent evidence of ratification. A new delivery of the deed is not requisite, as it would be if the deed of an insane person were void. * * *

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§ 46.—Liability for Necessaries.

READO v. MOSPLAY.

1886. 90 Mo. 251, 2 S. W. 405.

NORTON, J.— * * * It is insisted that the instruction of the court is erroneous, because it allows a recovery on an implied contract, and it is contended that an insane person cannot be bound on an implied contract. In support of this contention we have been cited to the case of Halley v. Troester, 72 Mo. 73. It is only held in that case that an insane person cannot bind himself by express contract. It does not go so far as to overthrow the rule that when necessaries are furnished an insane person that the law will imply a contract to pay for them. The rule is thus stated by Phillips on Lunatics, 17: "The courts of law and equity imply a contract by one *non compos mentis* for necessaries supplied to him, but if he is really sufficiently

supplied with any goods it seems he is not liable for a further supply of such goods, although supplied without notice of the previous supply." The principle announced by this author is emphasized in the case of Sawyer v. Lufkin, 56 Me. 308, where it is said by Appleton, C. J.: "This is an action for necessaries furnished the defendant, an insane person over twenty-one years of age, and under guardianship. The guardian appears and contests the claim. If necessaries are furnished a person in this condition, in good faith, and under circumstances justifying their being so furnished, the person furnishing may recover. If the law were not so, the insane might perish, if a guardian, having means, should neglect or refuse to furnish the supplies needed for their support. They stand in the same position as minors, and are liable for necessaries. * * *

BOOTH v. COTTINGHAM.

1891. 126 Ind. 431, 26 N. E. 84.

ELLIOTT, J.— * * * The wife of an insane man is entitled to medical attention, and the physician who renders it upon the request of the guardian of the insane husband is entitled to compensation out of the estate held in trust for him by his guardian. The proposition that a sick and suffering wife shall be provided with reasonable medical attention seems so clear that we cannot conceive how any one can doubt its correctness. It would be a reproach to the law, if a wife of an insane man, whose estate is in the hands of a guardian, were denied the necessaries of life (and, surely, medical attention in illness is necessary), but no such reproach rests upon the law. For many years it has been settled that the wife of an insane man shall be provided with such things as are reasonably necessary to her comfort and welfare. Read v. Legard, 6 Exch. 636; *In re* Wood, 1 De Gex, J. & S. 465; Selby v. Jackson, 6 Beav. 192. * * *

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§ 47.—Marriage.

ORCHARDSON v. COFIELD.

1898. 171 Ill. 14, 49 N. E. 197.

WILKIN, J.— * * * Section 2 of chapter 89 of our statutes (Rev. St. Ill.) provides: "No insane person or idiot shall be capable of contracting marriage." Clause 6, § 1, chap. 131, says: "The words 'insane person' and 'lunatic' shall include every idiot, *non compos*,

lunatic, insane or distracted person." These provisions are but declaratory of the common law. (1 Bishop on Marriage and Divorce, par. 136; 1 Kent Com. 76; Jenkins v. Jenkins, 2 Dana (Ky.) 102; Camp v. Morgan, 3 Ired. Eq. (N. Car.) 91). In the latter case it was said: "We have no doubt that by the common law of England, as far as can be traced for four or five centuries, a marriage of a lunatic is void, and must be pronounced so by every court to each and every form in which the subject can be presented." And we said in Cartwright v. McGown, 121 Ill. 388: "A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto or after their death." Also: "A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so." * * *

It is impossible to prescribe a definite rule by which the mental condition as to sanity or insanity can in every case be tested. That laid down by Mr. Bishop in his work on Marriage, Divorce and Separation (vol. 1, § 600,) is generally approved. After referring to the decisions of different courts on the subject, he says (§ 599): "Marriage is the legal band around affections assumed to be already united and the blending of two lives in one, and while it is in some degree of the head, it is primarily and chiefly of the heart. Hence, in reason the test question should be,whether or not the parties have the capacity of mind required for duly comprehending this union." * * *

DRUNKEN PERSONS.

§ 48.—General Rule.

BARRETT v. BUXTON.

1826. 2 Aikens (Vt.) 167.

PRENTISS, J.—This is an action upon a promissory note, executed by the defendant to the plaintiff for the sum of $1,000, being the difference agreed to be paid the plaintiff on a contract for the exchange of lands. The agreement of exchange was in writing, and the plaintiff afterwards tendered to the defendant a deed, in performance of his part of the agreement, which the defendant refused. The defendant offered evidence to prove, that at the time of executing the note and agreement, he was intoxicated, and thereby incapable of judging of the nature and consequences of the bargain. The court refused to admit the evidence, without proof that the intoxication was procured by the plaintiff. The question is, whether the evidence

was admissible as a defense to the action, or, in other words, whether the defendant could be allowed to set up his intoxication to avoid the contract. * * *

On principle, it would seem impossible to maintain, that a contract entered into by a party when in a state of complete intoxication, and deprived of the use of his reason, is binding upon him, whether he was drawn into that situation by the contrivance of the other party or not. It is an elementary principle of law, that it is of the essence of every contract, that the party to be bound should consent to whatever is stipulated, otherwise no obligation is imposed upon him. If he has not the command of his reason, he has not the power to give his assent, and is incapable of entering into a contract to bind himself. Accordingly Pothier holds (vol. 1, chap. 1, art. 4, § 1), that inebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to contract, since it renders him incapable of assent. And it seems Heineccius and Puffendorf both consider contracts entered into under such circumstances, as invalid. By the Scotch law, also, an obligation granted by a person while he is in a state of absolute and total drunkenness, is ineffectual, because the grantor is incapable of consent; but a lesser degree of drunkenness, which only darkens reason, is not sufficient. (Ersk. Inst. 447.) The author of the late excellent treatise on the principles and practice of the court of chancery, after reviewing the various cases in equity on the subject, and citing the Scotch law with approbation, observes, "the distinction thus taken seems reasonable; for it never can be said that a person absolutely drunk, has that freedom of mind, generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At law it has been held, that upon *non est factum* the defendant may give in evidence, that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a court of equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation." (1 Mad. Ch. 302.) Mr. Maddock seems to consider it as settled, that at law, complete intoxication is a defense, and that it ought to be a sufficient ground for relief in equity; and, indeed, it would seem difficult to come to a different conclusion. As it respects crimes and torts, sound policy forbids that intoxication should be an excuse; for if it were, under actual or feigned intoxication, the most atrocious crimes and injuries might be committed with impunity. But in questions of mere civil concern, arising *ex contractu,* and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined, or even embarrassed, by a bargain, when thus deprived of his reason. It is

a violation of moral duty, to take advantage of a man in that defenseless situation, and draw him into a contract; and if the intoxication is such as to deprive him of the use of his reason, it cannot be very material, whether it was procured by the other party, or was purely voluntary. The former circumstance would only stamp the transaction with deeper turpitude, and make it a more aggravated fraud. The evidence which was offered and rejected at the trial in the case before us, went not only to show that the defendant was so intoxicated at the time of giving the note, as to be incapable of the exercise of his understanding, but that the contract was grossly unequal and unreasonable; and, both on principle and authority, we think the evidence was admissible, and that a new trial must be granted.

WILLCOX v. JACKSON.

1879. 51 Iowa 208, 1 N. W. 513.

THIS was an action upon a promissory note, made by the defendant, N. P. Jackson, and for the foreclosure of a mortgage executed to secure the same.

DAY, J.— * * * The defendant insists that the note and mortgage were fraudulently obtained from him whilst he was in a state of intoxication. The law upon the subject of avoiding contracts on the ground of drunkenness is declared in Story's Eq. Jur., § 231, as follows: "But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must arise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding. * * * If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him. For, in general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practiced." In Mansfield v. Watson, 2 Iowa 111, the law is declared in about the same terms. Whilst the evidence shows that the defendant drank to a considerable extent during the time that the settlement was in progress, yet we cannot

find from the evidence that his intoxication was of such excessive character as will, under the authorities above cited, authorize the setting aside of his contract on the ground of drunkenness alone. * * *

FOWLER v. MEADOW BROOK WATER CO.

1904. 208 Pa. 473, 57 Atl. 959.

POTTER, J.—The plaintiff in this case sought to repudiate a contract, upon the ground that when he made it he was so completely intoxicated as not to know or understand what he was doing. Upon the trial the learned judge of the court of common pleas charged the jury that, in order to avoid the contract, the plaintiff must prove not only the fact of intoxication, but in addition must show one of three things: First, that the contract was procured by fraud or undue influence; second, that the defendant knew, or should have known by something appearing in the transaction, of the plaintiff's condition at the time; or third, that the transaction was manifestly unfair or oppressive.

We think this was going too far. In Bush v. Breinig, 113 Pa. St. 310, 316, 6 Atl. 86, 88, 57 Am. Rep. 469, we said: "The rule formerly was that intoxication was no excuse, and created no privilege or plea in avoidance of a contract; but it is now settled, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable, and may be avoided by himself, though the intoxication was voluntary, and not procured by the circumvention of the other party." In the present case the court was therefore in error in its instruction to the jury with regard to the effect of the intoxication of the plaintiff upon the validity of the contract. But in order to recover it was incumbent upon the plaintiff to prove not only that he was incapacitated by intoxication when the contract was made which he now seeks to repudiate, but he must go further, and show that he rescinded the agreement within a reasonable time after his recovery. The rule with regard to rescission is thus stated in 21 Am. & Eng. Ency. Law 84: "Where a contract is sought to be rescinded by one of the parties thereto, he must place the other *in statu quo*. He will not be allowed to repudiate a contract and retain the benefit derived thereunder against equity and good conscience, but must return, or offer to return, such benefit." There is also a thorough discussion of the question by Judge Sharswood in Beetem's Adm'rs v. Burkholder, 69 Pa. St. 249, which he begins by saying that, "whenever one of the parties to a contract has the right to rescind it, and elects to do so, before commencing his action to recover back the money which he has paid,

he must give notice to the vendor, and offer to return the thing sold." * * *

MANSFIELD v. WATSON.

1855. 2 Iowa 111.

WRIGHT, C. J.— * * * In law, the acts of the drunkard are avoided on the ground of incompetency; in equity, on that of fraud. But as mere moderate drunkenness does not deprive the mind of the power of rational consent, and is not always apparent to others, it should not of itself avoid any deed or contract. In order to avoid the deed or contract, there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing. This is the modern English doctrine, and that followed by the courts of this country, as well as of France. Ray's Med. Ins. of Ins., § 450; Story's Eq. Jur., § 231. And this excessive drunkenness is a defense, whether voluntary, or caused by the fraud or procurement of the other party to the contract. 2 Greenl. Ev., § 374. But there may be such contrivance or management on the part of the plaintiff, to draw the party into drink, and thus to take advantage of his intoxication, as would justify the interposition of a court of equity, on the ground of fraud, even where the drunkenness is less than excessive. Story's Eq. Jur., § 231. In either event, such intoxication only renders the contract voidable, and not void, and the party, on recovering his understanding, may adopt the same. Story on Cont., § 27; Reiniker v. Smith, 2 Har. & John. (Md.) 423; Reynolds v. Waller's Heirs, 1 Wash. 164. * * *

PERSONS UNDER CONSERVATORS.

§ 49.—General Rule. A contract, other than for necessaries, made by a person while under a conservator, is void as against such person and his estate.

WADSWORTH v. SHARPSTEEN.

1853. 8 N. Y. 388.

RUGGLES, C. J.—When a man has been found by inquisition duly taken in pursuance of the statute to be incapable of conducting his own affairs in consequence of habitual drunkenness, his property, real and personal, is taken out of his hands, and put into the custody and control of a committee. The object of this proceeding, is to pre-

vent the property being wasted and destroyed; and to provide for the maintenance of himself and his family and the education of his children. The committee is required to file an inventory of the property and to give security for the performance of the trust. This trust continues without interruption until the death of the drunkard or the superseding of the commission. The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals; and, therefore, during such intervals the drunkard has no more authority to deal with, or dispose of the property than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication; and the committee could not execute his trust with safety to himself or benefit to the drunkard or his family. Similar consequences would unavoidably follow from permitting the drunkard during sober intervals to contract debts or incur liabilities, by which the property might be seized and sold on judgment and execution. The effect of the inquisition is that the drunkard is incapable at all times of conducting his affairs; and they are, therefore, taken wholly out of his control. From the very nature and object of the proceeding, therefore, the inquisition must be regarded as conclusive evidence of the incapacity of the drunkard to dispose of his property or to contract debts from the time when it is found. This was so decided in L'Amoreux v. Crosby, 2 Paige (N. Y.) 427. And in Leonard v. Leonard, 14 Pick. (Mass.) 283, a decree of the probate court declaring a person *non compos mentis* and putting him under guardianship was held to be conclusive evidence of the disability of the ward against a person dealing with him during his wardship. * * *

See also, Rev. St. Ill., ch. 86.

LEGGATE v. CLARK.

1873. 111 Mass. 308.

MORTON, J.— * * * We are of opinion that the presiding judge erroneously ruled that the order of the judge of probate committing Leggate to the insane hospital was admissible and *prima facie* evidence of his insanity. The question before the judge of probate was different from the issue in this case. The proceedings before him were under the Statutes of 1862, ch. 223, § 3, which authorizes judges of probate to commit to either of the state lunatic hospitals "any insane person who, in their opinion, is a proper subject for its

treatment or custody." The issue before the jury was whether Leggate was of sufficient mental capacity to give an intelligent assent to his wife's conveyance of real estate. A man may be a proper subject for the treatment and custody of a lunatic hospital, and yet have sufficient mental capacity to make a will, to enter into contracts, to transact business and to be a witness. Kendall v. May, 10 Allen (Mass.) 59. The order of the judge of probate was in a proceeding to which the tenant was not a party, and as to which he had no opportunity to be heard, and was upon an issue different from the issue on trial. The demandant contends that it is analogous to an inquisition of lunacy, or a decree of a judge of probate appointing a guardian of an insane person, and therefore admissible against strangers. But an inquisition of lunacy under the English system, and proceedings under our system to appoint a guardian of an insane person, are in the nature of proceedings *in rem,* and are designed to fix the *status* of the person proceeded against. Under our system careful provision is made for notice to the alleged insane person, and for a full hearing, and the decree fixes the *status* of the ward as an insane person "incapable of taking care of himself." The statutes give the care and management of his person and estate to the guardian and take from him the capacity to make contracts or to transfer his property. The necessary effect of the decree is that the ward is in law, what the decree declares him to be, incapable of taking care of himself, as to all the world. Otherwise the object of the statute would be entirely defeated. Gen. Sts., ch. 109; Chase v. Hathaway, 14 Mass. *222*; Leonard v. Leonard, 14 Pick. (Mass.) 280. But an order under the Statutes of 1862, ch. 223, § 3, is not of this character. It does not pretend to declare the person committed to the hospital to be incapable of transacting business. It does not take from him the care and management of his estate. It affords a justification for the restraint of his person, but is not designed to fix his *status.* We think that the admission of the order of the judge of probate and the ruling as to its effect were erroneous. * * *

Exceptions sustained.

TOPEKA WATER SUPPLY CO. v. ROOT.

1895. 56 Kan. 187, 42 Pac. 715.

ALLEN, J.— * * * The question presented, is whether a person who has been adjudged insane, and placed in an asylum for treatment, and has thereafter been discharged from the asylum because of her improved condition, is conclusively presumed to continue insane, notwithstanding the fact that she has no guardian, and is not under treatment for insanity, until a formal adjudication shall be had, finding that she has been restored to her reason. After her discharge

from the asylum, and after her restoration to reason, in fact, the only purposes such an adjudication could serve would be to discharge her guardian, if she had one, to restore her to the possession of her property, if she possessed any, and to remove her disability to enter into contracts. We think it would be extremely hazardous to hold that all contracts made by a person in fact sane, and not under guardianship, are void, merely because of a prior adjudication of insanity, and a failure to have an adjudication of restoration to reason. Such a rule might lead to most unjust results. A person might be, in fact, entirely sane, and of extraordinary shrewdness in business affairs. Being under no restraint, and having no guardian in charge of his property, it would certainly be wrong to allow him to enforce or avoid his contracts as he might see fit. But, in this case, it is not Catherine Felitz who seeks to avoid her contract, nor is her guardian here suing for any property or money belonging to her. It is the water company that is seeking to avoid it. This it cannot do, unless the contract is absolutely void and incapable of ratification. If it is merely voidable, at the election of Catherine Felitz herself, such voidability avails the plaintiff in error nothing. In the case of McCormick v. Littler, 85 Ill. 62, it was held that, "although a person may have been adjudged insane, yet, if no conservator has been appointed, and he is in the management of his business, and there is nothing about his appearance to indicate his incapacity to contract, if he purchases an article at a fair and reasonable price, necessary and useful in his business, the seller having no notice of his being adjudged insane, he will be liable to pay the price he agrees to pay, and it will be error to enjoin a judgment on a note given for the price." In Elston v. Jasper, 45 Tex. 409, it was held that "the deed of an insane person is not void, but voidable only; but such person, while actually under legal and subsisting guardianship, and in support of the guardian's authority, is conclusively presumed incompetent to contract, and his deed, as against his guardian, is absolutely void. If, however, as an actual fact, the guardianship had been practically abandoned at the time of the sale, and the person who had been insane was, when the deed was executed, of sound mind, the contract, if fair, will be enforced. The burden of proving the restoration to reason, and the termination or practical abandonment of the guardianship of one insane, is upon him who seeks the enforcement of a contract against him who pleads insanity." * * *

CORPORATIONS.

§ 50.—Capacity to Make Contracts.

A corporation is an artificial person created by the law, and has the capacity to make contracts within the scope of the powers conferred upon it by the act of incorporation.

A contract is within the scope of the powers of a corporation when it is directly authorized, or is necessary or reasonably incidental to the exercise of a power expressly conferred or is required or reasonably appropriate for the furtherance of the general purpose for which the corporation was created, and is not within any positive prohibition or inconsistent with the nature and purpose of the corporation.

METROPOLITAN BANK v. GODFREY ET AL.

1860. 23 Ill. 579.

BREESE, J.— * * * It was declared, in the case of Head & Amory v. The Providence Insurance Co., 2 Cranch (U. S.) 127, 167: In its corporate capacity a corporation is a mere creature of the act to which it owes its existence; it may correctly be said to be precisely what the act incorporating it has made it; to derive all its powers from the act; and to be capable of exerting its faculties only in the manner that act authorizes.

This doctrine has been recognized and adhered to by all courts in this country, without any serious departure from it. 2 Kent's Com. 298; Dartmouth College v. Woodward, 4 Wheaton (U. S.) 636; Safford v. Wyckoff, 4 Hill (N. Y.) 442; Talmage v. Pell, 3 Sheldon (N. Y.) 340. * * *

BYRNE v. SCHUYLER ELECTRIC MFG. CO.

1895. 65 Conn. 336, 31 Atl. 833.

ANDREWS, C. J.— * * * An act is *ultra vires* of a corporation when it is not within the power of the corporation to perform it. The charter of any corporation is its enabling act. The corporation is empowered to do those things only for which it is created, and to do them in the manner specified in the charter. This is especially the rule in the case of private trading or manufacturing corporations. "The charter is the full measure of the powers which the corporation possesses. It cannot lawfully exercise any others. In

ordinary cases every corporation is just what the incorporating act has made it, and is capable of exercising its faculties only in the manner the act authorizes." Farrell v. Railroad Co., 61 Conn. 127, 23 Atl. 757; Inhabitants of Berlin v. Inhabitants of New Britain, 9 Conn. 180; Bank v. Earle, 13 Pet. (U. S.) 587 (Taney, C. J.). And, as charters of this kind are usually granted at the request of the corporators, they are construed most strongly against the corporation. Nothing is granted except what is given expressly or by fair implication. * * *

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§ 51.—When Contract is Within Scope of Powers.

ROCKWELL v. ELKHORN BANK.

1861. 13 Wis. 653.

DIXON, C. J.—It is a universally accepted principle, that corporations authorized generally to engage in a particular business have, as an incident to such authority, the power to contract debts in the legitimate transaction of such business, unless they are restrained by their charters, or by statute, from doing so. It is likewise an equally well acknowledged rule, that the right to contract debts carries with it the power to give negotiable notes or bills in payment or security for such debts, unless the corporations are in like manner prohibited. These positions are abundantly sustained by the authorities. * * *

THE PEOPLE EX REL. v. CHICAGO GAS TRUST CO.

1889. 130 Ill. 268, 22 N. E. 798.

MAGRUDER, J.— * * * Can the power to purchase and hold the stock of other gas companies be lawfully exercised by the appellee as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas?

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. (C. P. & S. W. R. R. Co. v. Marseilles, 84 Ill. 643; Chicago Gas Light Co. v. People's Gas Light Co., 121 *id.* 530). An incidental power is one that is directly and immediately appropriate to the execution of the specific

power granted, and not one that has a slight or remote relation to it. (Hood v. N. Y. & N. H. R. R., *22* Conn. 1; Franklin Co. v. Lewiston Savings Institution, 68 Maine 43.)

Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company cannot be implied because both companies are engaged in a similar kind of business." (1 Morawetz on Priv. Corp., sec. 431.) * * *

If, then, the power to purchase outside stocks cannot be implied from the power to operate gas works and make and sell gas, a company, to whom the latter power has been expressly granted, cannot exercise the former without legislative authority to do so. This is the law as settled by the great weight of authority.

Boone on the Law of Corporations says: "Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." In Green's Brice's Ultra Vires (page 91, note b) it is said: "In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it." So also Morawetz on Private Corporations (secs. 431, 433) says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. * * * A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools." The authorities referred to by these text writers sustain the conclusions announced by them. It has been held in many cases, that, "in the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law," and that "one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute." (Franklin Co. v. Lewiston Sav. Ins., supra; Franklin Bank v. Commercial Bank, 36 Ohio St. 350; Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. Pr. (N. Y.) 20; Sumner v. Marcy, 3 W. & M. (U. S.) 105; Mut. Savings Bank v. Meriden Agency, 24 Conn. 159; Central R. R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah R. R. Co., 43 *id.* 13; Berry v. Gates, 24 Barb. (N. Y.) 199).

The special charters of the Chicago Gas Light and Coke Co. and

of the People's Gas Light and Coke Co., which are set out in full in the information and not called in question in any of the pleas, confer, by express grant, the power to erect gas works and manufacture and sell gas, etc., but do not confer the power to buy shares of stock in other companies; upon the latter subject they are silent. It will not be denied, that, under the authorities already cited, these two companies cannot buy and hold stock in other gas companies. The same would undoubtedly be admitted to be true of the Chicago Gas Trust Company, if it held under a special charter of like tenor and effect granted before the adoption of the constitution of 1870. Does it make any difference that the appellee was organized under the general incorporation act.

The general incorporation act of this state does not, in express terms, confer upon the corporations organized under it the power to purchase and hold shares of stock in other corporations. It is silent upon that subject. The only powers granted by it are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and be sued, to have a common seal, etc. The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place. (1 Morawetz on Priv. Corp., sec. 318.) The provisions of the law enter into and form a part of the charter. It certainly cannot be true, that a corporation, formed under the general incorporation act for a purpose other than that of dealing in stocks, can exercise the power of purchasing and holding stock in other corporations, where such power cannot be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect.

The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the Secretary of State? We think not. The action of the Secretary of State in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial. (Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1; 4 Am. & Eng. Ency. of Law, Tit. Corporations, page 192, note 1.) Whether the articles of association, consisting of the Statement, the License, the Report of the Commissioners, the Certificate of Organization, etc., do or do not confer such rights and powers as are authorized by the law, is a matter for judicial determination. Counsel for appellee say: "We do not claim, of course, that the action of the Secretary of State is conclusive and not subject to review by this court," etc.

The question whether or not the power to purchase stock is a

lawful purpose under § 1 of the Incorporation Act, which provides that "corporations may be formed in the manner provided by this act *for any lawful purpose,*" does not arise under this branch of the discussion. It will be pertinent when we come to consider the right to buy and hold stock, as an original and independent power, or object of formation. It is not denied by the appellant, that the organization of appellee for the purpose of erecting gas works and making and selling gas, is an organization for a lawful purpose. Viewing that as the main purpose for which appellee was formed, the incorporators could not tack on and connect with such main purpose the power to buy and hold stock in other gas companies by merely describing such power in the statement. To hold, that they could confer such power by writing it down in the statement would be to hold that the general assembly could clothe them with a part of its legislative functions.

When a corporation is formed under the general incorporation act for the purpose of carrying on a lawful business, the law, and not the statement, or the license, or the certificate, must determine what powers can be exercised as incidents to such business. Even if shares of stock be regarded as personal property, as claimed by counsel for appellee, § 5 of the general law provides, that corporations formed under it "may own * * * so much * * * personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation, * * * and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed. This language negatives the idea that a corporation formed under the general law can exercise the power of buying and holding the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence, it is forbidden to own such stock, the same being "personal estate."

The language of the act, as thus quoted, expressly restricts the powers of a corporation organized under it to such powers as are necessary and requisite to carry into effect the object for which it was formed. We have already seen, that, where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. Therefore, the general incorporation act not only does not expressly authorize the purchase of such stock, but impliedly forbids it in cases where the main purpose of the corporate creation is other than the purchase and sale of stocks.

It has been held, that the powers obtained by corporations organized under general laws are necessarily restricted to those mentioned in the act (Medical Coll. Case, 3 Whart. (Pa.) 445); that, in such cases, the charter is void as to all powers and privileges granted beyond the provisions of the statute (Heck v. McEven, 12 Lea (Tenn.)

97); that, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void (Eastern Plank R. Co. v. Vaughan, 14 N. Y. 546); that anything in such articles not warranted by the statutes, authorizing the formation of corporate bodies, is void for want of authority (Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1); and that such articles must be construed strictly, and against the grantee and in favor of the government or the general public. (*Idem.*)

Our conclusion upon this branch of the case is, that, if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation. * * *

JACKSONVILLE, MAYPORT, PABLO RY. & NAV. CO. v. HOOPER ET AL.

1895. 160 U. S. 514.

THE contract between the parties hereto was for leasing a hotel at the terminus of the railroad, situated at a beach, distant from any town.

SHIRAS, J.— * * * We think the present case falls within the language of Lord Chancellor Selborne, in Attorney General v. Great Eastern R. Co., L. R. 5 App. Cas. 478, where, while declaring his sense of the importance of the doctrine of *ultra vires*, he said: "This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*." In the application of the doctrine the court must be influenced somewhat by the special circumstances of the case. As was said by Romilly M. R. in Lyde v. Eastern Bengal R. Co., 36 Beav. 10, where was in question the validity of a contract by a railway company to work a coal mine: "The answer to the question appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coal to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this

trade would depend on the conclusions which the court drew from the evidence."

The principle upon which we may safely rule the present question is within the case of Brown v. Winnisimmet Co., 11 Allen (Mass.) 326. There a contract made by the treasurer of a ferry company to lease one of the company's boats for a certain money consideration was alleged to be void for want of antecedent authority given by the company to the treasurer, and also because such a contract was not made in the legitimate exercise of the company's powers. On the first point it was ruled that, from evidence showing ratification by the company, it was proper for the jury to infer that the treasurer had been duly authorized to make the contract, and, disposing of the second question, the court, through Chief Justice Bigelow, said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." See also Davis v. Old Colony R. Co., 131 Mass. 258, 272, 41 Am. Rep. 221.

The contract between the parties hereto was for leasing a hotel at the terminus of the railroad, situated at a beach, distant from any town. If not fairly within the authority granted by the statute of Florida "to erect and maintain all convenient buildings * * * for the accommodation and use of their passengers," it certainly cannot be said to have been forbidden by such laws. Nor can it be said to have been, in its nature, contrary to public policy.

To maintain cheap hotels or eating houses at stated points on a long line of railroad through a wilderness, as in the case of the Pacific railroads, or at the end of a railroad on a barren, unsettled beach, as in the present case, not for the purpose of making money out of such business, but to furnish reasonable and necessary accommodations to its passengers and employees, would not be so plainly an act outside of the powers of a railroad company as to compel a court to sustain the defense of *ultra vires,* as against the other party to such a contract. * * *

THE PEOPLE v. PULLMAN CAR CO.

1898. 175 Ill. 125, 51 N. E. 664.

IN this case one of the questions was whether the Pullman Car Co., a manufacturing corporation, had power, under a charter provision giving it authority to acquire and hold such real estate as might be deemed necessary for the successful prosecution of its business, to purchase near Chicago, several hundred acres of open prairie as a site for its plant and subdivide the land not occupied by the plant into lots and blocks, with streets, alleys and parks, erect houses, churches, school buildings, stores and rent them respectively to employees, religious denominations, school boards and business men; and whether such action could be sustained on the ground of expediency, or of necessity in providing its employees with shelter, educational advantages, markets, and place for worship and amusement.

BOGGS, J.— * * * The averment of the plea the corporation was obliged to construct such houses and tenements is but the statement of a conclusion, and we find the facts pleaded do not justify such a deduction. No reason existed, nor do we find in the pleas even a suggestion that there was reason or ground, for the apprehension that individual enterprise and private capital would not at once, after the purpose and intention of the corporation became known, provide all necessary dwellings and tenements for the accommodation of the workmen, or that the wants of the community composed of such workmen would not at once be met by the location in its midst of schools, churches, dry goods and grocery stores, meat markets, etc., or that the necessary streets, alleys and public ways would not be provided without any intervention whatever on the part of the corporation. The public laws of the state would have supplied the requisite school houses and teachers, and the inclinations of the individual members of the community could have been safely relied upon to provide church houses and rooms for imparting religious instruction. It is idle to argue it became in any sense necessary or directly appropriate to the accomplishment of the lawful and chartered purposes or objects of the corporation it should engage its efforts or capital in the construction of dwellings, tenement houses, store houses, streets, alleys, theaters, hotel, churches, school houses, water-works, a system of sewers, etc. Workmen, if they have families, must have homes, or if unmarried must be accommodated with boarding and places of lodging. Homes, groceries, vegetables, bread, meat, clothing, furniture, light, heat, water, school books, medicine, the services of physicians, dentists and other professional men, and many other things, become necessary to the health, comfort or convenience of such workmen and their families; but the right and power to supply such wants had, in this instance, so far as the pleas show, no direct relation or connection with the successful

prosecution of the specific object of the appellee corporation. The relation was but remote, indirect and mediate,—not direct and immediate. Implied power cannot be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with the specific purposes it was created to accomplish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interest and chartered objects cannot be justified by implication of law but are *ultra vires.*

Cases cited holding corporations operating mines or mills engaged in sawing lumber had implied power to construct dwellings and boarding houses for their employees can have little or no influence upon the question here presented. In those cases the fact the works or mills of the corporations were necessarily located at mines or near large forests, and other circumstances peculiar to the respective cases, were deemed sufficient to justify the corporations in arranging for the lodging or boarding of their workmen or in building homes to shelter them and their families. The circumstances in each of such cases as can be accepted as having been well considered, were such it became, in a legal sense, necessary to the accomplishment of the chartered purposes of the corporation that it should exercise such power as was accorded it by implication of law. Exceptional circumstances or extraordinary conditions may make it necessary to the proper prosecution of the business of a corporation that it shall be accorded implied power to perform acts beyond its express power, and which, except for the prevailing conditions, would be wholly unwarranted. But in the case in hand the appellee corporation voluntarily assumed to devote its corporate capital and power to that which, to say the least, but remotely and indirectly tended to aid the accomplishment of the purposes it had the right to pursue under conditions and circumstances which were neither rare nor unusual. * * *

CRICHFIELD ET AL. v. BERMUDEZ ASPHALT PAVING CO.

1898. 174 Ill. 466, 51 N. E. 552.

THIS was an action on a contract whereby the appellee company had contracted to employ appellants as its agents to "solicit and promote" the asphalt paving business in the city of Chicago.

MAGRUDER, J.— * * * There are some salient features of this agreement which stamp it as being against public policy. A special assessment for a public improvement under our statute is a species of taxation, and is authorized only as an exercise of the tax-

ing power. A special assessment should not be levied, except for the purpose of making a needed public improvement. The property owner should not be assessed and his property made to bear the burden of taxation, except to secure the benefits of a needed public improvement. The making of a contract to promote the levying of a public assessment, not for the purpose of securing to the public a needed improvement, but for the purpose of enabling a paving company to get a job, is not only against the public interest, but is abhorrent to all proper ideas of justice and honor. Property owners should not be assessed for the purpose of paying moneys into the pockets of paving contractors, and any contract, by which parties agree to obtain ordinances by solicitation and by the exercise of influence upon public officials, and with a view of obtaining contracts which result in the end from the passage of such ordinances, is against public policy, and will not be enforced by the courts. It makes no difference whether the parties were actually guilty of bribery and corruption under the contract or not. If the performance of the obligations imposed by the contract has an evil tendency or furnishes a temptation to use improper means, the contract is illegal and *contra bonos mores*.

One of the striking features of this contract is, that, with the exception of the monthly allowance to be paid to the appellants, the compensation to be received by them is contingent upon their success in obtaining the necessary legislation for the levying of special assessments, and in securing the paving contracts consequent thereupon.

In Marshall v. Baltimore and Ohio Railroad Co., 16 How. (U. S.) 314, a special contract was sued upon, whereby the plaintiff was employed to attend the sessions of the legislature of Virginia, in order to superintend and further any applications or other proceeding to obtain the right of way through the state of Virginia on behalf of a railroad company; and the Supreme Court of the United States there said: "Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector." The court further say in that case: "It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or

contaminate, by improper influences, the integrity of our social or political institutions. * * * It is the interest of the state that all places of public trust should be filled by men of capacity and integrity, and that the appointing power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court. * * * Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require, that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confined. * * * Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means, which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors." The court, after referring to a large number of cases, concludes as follows: "The sum of these cases is, that all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislatures, is void by the policy of the law."

It is clear to our minds, that the contract now under consideration is a contract which provides for a contingent compensation for obtaining ordinances for paving. An ordinance passed by the common council, providing for the paving of a public street, is a species of legislation, as much as an act passed by the legislature; though the body passing it is subordinate in its character and created by the legislature itself. The rule, therefore, which makes void a contract for a contingent compensation for obtaining legislation, applies as well to the common council of a city, as to the legislature of a state. * * *

Counsel claim that the conditions of modern life are widely different from those of the times immediately preceding us, and that, in view of the revolutions in business methods which have taken place in modern times, what was decided to be against public policy in the past generations may be a common and ordinary method of doing business to-day, which is approved by the common sense of men. That which is against public morals and public decency should be subject to the condemnation of the courts in all generations. Righteousness is the same to-day as it was yesterday. The refinements of modern civilization may have increased the forms of bribery and corruption and made them more dangerous and insinuating, but they none the less merit the reprobation of honest men. * * *

CHEWACLA LIME-WORKS v. DISMUKES ET AL.

1889. 87 Ala. 344, 6 So. 122.

ASSUMPSIT by Dismukes, Frierson & Co. against Chewacla Lime-Works, for the price of goods sold and delivered. Verdict and judgment for plaintiffs and defendant appeals.

CLOPTON, J.— * * * It clearly appears that, at the time of the sale and delivery of the goods, the corporation was engaged in carrying on a general mercantile business, for which purpose they were bought. The material ground on which the defendant resists a recovery is that the Chewacla Lime Company had no authority to engage in such business, and that the contract of purchase is *ultra vires*. The question raised involves the application of only a few principles of law, which may be regarded elementary. As corporations derive their existence and capacity from a special statute, or a general law, empowering them to organize, they cannot exercise any power, or act in any capacity, not authorized by the act of incorporation or the general law. A corporation has no implied authority to engage in any business other than the particular enterprise for which it is chartered, or to do any act, or make any contract, not in pursuance of the purposes for which it was created. Authority to carry on a particular business includes authority to conduct it in the usual and customary modes. Within the scope and purview of the chartered powers, the business for which the corporation was chartered may be conducted in the same manner as individuals would conduct the same enterprise under similar circumstances, but any transaction or contract beyond this, not necessary or proper to enable the corporation to anwer the purposes of its creation, is void. * * * It is manifest that the act of incorporation grants no express authority to engage in a general mercantile business. Is there implied authority? The declared objects of the corporation are the mining and manufacture of lime rock, and putting the product in a marketable condition. These purposes constitute limitations upon the exercise of the express and implied powers. There may be circumstances under which a manufacturing company would have implied authority to connect a supply store with the business of the corporation, as being ancillary thereto. In such case, the real and primary object must be auxiliary to the main enterprise of the corporation, for the purpose of providing supplies for the employés and laborers, founded on necessity arising from situation and condition. No circumstances are shown which bring the present case within this exception. A general mercantile business does not pertain to the purposes of mining and manufacturing lime rock. They are separate and distinct in their nature and objects. A coal mining company has no implied authority to buy coals in the market for the purpose of resale as a speculation. Alexander v. Cauldwell, 83 N. Y.

480. A corporation authorized and organized to manufacture lime cannot buy lime manufactured elsewhere for the purpose of trade, in order to raise funds to carry on the corporate business. As well might such corporation engage in any other distinct business as that of merchandising, because it may be deemed profitable, and will thus contribute, indirectly, to promote the objects of the corporation. A general mercantile business being a distinct branch of business, the Chewacla Lime Company had no authority, expressed or implied, to engage in carrying on the same. * * *

Reversed and remanded.

BRUNSWICK GASLIGHT CO. v. UNITED GAS, FUEL & LIGHT CO.

1893. 85 Me. 532, 27 Atl. 525.

WALTON, J.—The question is whether a gas company, which possesses and exercises the right to lay its pipes in the public streets, can sell, lease, or assign its corporate rights and privileges to another gas company, without the consent of the legislature.

We think the question must be answered in the negative. Corporations possessing and exercising the right of eminent domain owe duties to the public from the performance of which they are not allowed to escape by sale or lease of their franchises without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges; and they may be lost by the foreclosure of a legally executed mortgage; and they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But, subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or quasi-public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric light companies, telegraph and telephone companies, street railway companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. And one reason why these corporations are not allowed to sell or lease their corporate powers and franchises without legisla-

tive authority is that, if they were able to do so, they might thereby disable themselves from the performance of their public duties, and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies. By its exercise, a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition, and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint.

To the argument that similar combinations may be made by individuals, it has been aptly replied that men are mortal, and their combinations, short-lived, but corporations are immortal, and their combinations and acquisitions may go on forever; that they may add field to field, wealth to wealth, and power to power, till they become too strong for the government itself; that all experience shows that such accumulations of wealth and power are dangerous to the public welfare; and that, while society can endure the accumulations and combinations of mortals, which must end at the grave, it cannot endure similar accumulations and combinations of power by corporations, which may continue forever.

In a case in New Jersey, decided in August, 1892, it is said that corporations which engage in a quasi-public corporation, such as railway, water, gas, telegraph and similar corporations, are created upon the hypothesis that they will be a public benefit; that they usually possess the right of eminent domain, and not unfrequently the use of the public highways is accorded to them, and that, while the state confers upon them these special and extraordinary privileges, it at the same time exacts from them the performance of public duties; that such corporations hold their franchises not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public; and that such corporations cannot lease or otherwise dispose of their franchises, needful in the performance of their public duties, without legislative consent. Stockton v. Railroad Co., 24 Atl. 964, 50 N. J. Eq. 52.

In the case in Illinois, decided in 1887, the court held that reason and the weight of authority were in favor of the doctrine that a corporation has no right to sell or lease its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain, without legislative authority. Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501.

In another case, decided in 1889, a corporation for the manufacture and sale of gas, having a capital of $25,000,000, had obtained by purchase a controlling interest in four other gas companies, having an aggregate capital of nearly $17,000,000; and, in the vigorous lan-

guage of the court, was thus able to destroy the energies of all other corporations of the same kind, and suck their life blood out of them; and the court held that such a combination could not be tolerated; that the business of manufacturing and distributing illuminating gas by means of pipes laid in the public streets of a city is a business of a public character; that it is the exercise of a franchise belonging to the state; that the services to be rendered for such a grant are of a public nature; and that any unreasonable restraint upon the performance of such duties is prejudicial to the public interest, and in contravention of public policy and could not be allowed. People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798.

Equally vigorous is the language of the New York court of Appeals. In a case relating to the combination known as the "Sugar Trust"—a trust that included the Forest City Sugar Refining Company of this state, and so successfully sucked its life blood out of it that its machinery has since remained as silent as a city of the dead —the court said that corporate grants are always assumed to have been made for the public benefit, and that any conduct which destroys their normal functions, and maims and cripples their separate activity, must affect unfavorably the public interest; and that this is so to a much greater extent when a combination includes and dominates an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion; that it is not a sufficient answer to say that similar results may be lawfully accomplished by an individual having the necessary wealth, for it is one thing for the state to respect the freedom of the citizen, and quite another thing to create artificial persons to aid in promoting such aggregations; that the individuals are few who hold such enormous wealth; but, if corporations can combine and mass their forces, a tempting and easy road is opened to enormous combinations, vastly exceeding in strength and in power over industry any possibilities of individual ownership. People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834.

The law does not assume that all combinations of corporate powers and franchises are necessarily hurtful. It recognizes the fact that they are sometimes beneficial, and provides a way by which they may be lawfully made. But as such combinations are liable to be made for improper purposes, and with conditions annexed to them which are inadmissible, sound public policy requires that they be made under legislative supervision and restraint.

In the present case, the Brunswick Gas Light Company undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel & Light Company for twenty-five years. The latter company took possession of the works, and held them for seventeen and one-half months, making improvements upon them, and paying a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void, and that no recovery could be had upon it. The presiding justice rules, as a matter of law, that the plaintiff company and the defendant company had power to execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and, without such authority, we think the lease must be regarded as *ultra vires,* and void. The authorities bearing upon the question are not in entire harmony, but the weight of authority seems to us to be overwhelmingly in favor of this conclusion. See 2 Beach Corp., §§ 831-856, inclusive, and the six pages of authorities pro and con cited under the section last cited. The cases to which we have referred will furnish a key to all of them.

But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that, while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void, and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray in a recent case in the United States supreme court. He said that a contract made by a corporation which is unlawful and void because beyond the scope of its corporate powers does not, by being carried into execution, become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract, and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371. We think this is the correct rule. 2 Beach Corp., § 423, and cases there cited.

Exceptions sustained.

§ 52.—Liability for Benefit Actually Received.

LEIGH v. AMERICAN BRAKE-BEAM CO.

1903. 205 Ill. 147, 68 N. E. 713.

CARTWRIGHT, J.—* * * The business of loaning money was not included in the powers granted to the corporation, and no action would lie upon the contract made in violation of the law. A corporation cannot make loans of money unless the exercise of its chartered powers ordinarily includes such loans. The business of this corporation was to invest and use its capital in making and selling brake-beams and other railroad appliances and to distribute its profits as dividends, and it had no power to loan its money or capital. (Cook on Stock and Stockholders, § 690.) Any contract to loan the moneys of the corporation would be illegal and void, and the courts can afford no legal remedy upon an illegal and void contract. (McNulta v. Corn Belt Bank, 164 Ill. 427; National Home Building and Loan Assn. v. Home Savings Bank, 181 *id.* 35; Best Brewing Co. v. Klassen, 185 *id.* 37; Fritze v. Equitable Building and Loan Society, 186 *id.* 183.) No action could be brought on the alleged contract even if the corporation had attempted to authorize it, and neither could it be made the ground of a defense.

That rule of law, however, does not prevent a recovery from the defendant of the moneys of the plaintiff received by him. Although a party is not liable to pay according to a contract which is *ultra vires,* that fact is not permitted to work injustice where the law can afford a remedy without enforcing the illegal contract, and the courts will give relief where it can be given independently of the contract. It would be unjust to hold that one who has received money or property under a contract which is *ultra vires* need not account for it because the contract was illegal, but the law implies a contract to return what has been received. Where a contract is not *malum in se* or *malum prohibitum,* and it has been executed or benefits have been received, the party benefited, whether the corporation or individual, will not be permitted to retain the fruits of the transaction without compensation. It has sometimes been said that where the contract has been in good faith fully performed by one party, the other party, who has had the benefit of the performance of the contract, will be estopped to plead its invalidity. (Bradley v. Ballard, 55 Ill. 413; Darst v. Gale, 83 *id.* 136; Kadish v. Garden City Building Assn., 151 *id.* 531.) Although this has been said in cases where the contract was not *ultra vires* in the proper sense, and the language was not, perhaps, strictly accurate, it was intended to declare the sound and wholesome doctrine that a party cannot retain the benefits, money or property received under a contract which is void merely for want of power to enter into it, without making compensation therefor.

Where a contract is *ultra vires*, and a corporation has received money under it which in equity and good conscience belongs to another and which it ought to pay over, it is liable for it in an action for money had and received, with interest after demand. (Brennan v. Gallagher, 199 Ill. 207.) The converse of the proposition is equally true, and an action for the recovery of the money would not enforce or affirm the original contract, but would disaffirm it. (27 Am. & Eng. Ency. of Law, 376.) As said by the supreme court of the United States in Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24: "The action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." The recovery in this case was for moneys had and received by the defendant for the use of the plaintiff, and this action will lie whenever one person has received money which in justice and right belongs to another and which should be returned. It is an equitable action to recover back money which the defendant ought to refund. (Allen v. Stenger, 74 Ill. 119; Wilson v. Turner, 164 *id.* 398.) * * *

VOUGHT v. EASTERN BUILDING & LOAN ASS'N.

1902. 172 N. Y. 508, 65 N. E. 496.

MARTIN, J.— * * * The only remaining question we deem it necessary to consider arises upon the contention of the defendant that it was unauthorized by the statute under which it was organized to make the contract in suit, and hence the plaintiff cannot recover. The defendant was organized under the provisions of chapter 122 of the laws of 1851 and the statutes amendatory thereof and supplemental thereto. We deem it unnecessary at this time to determine whether the defendant was authorizd by that statute to enter into such contracts for, if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled (in this court) that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters, and when they do

so their exemption from liability cannot be claimed on the mere ground that they have no attributes or facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that, while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet, when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power. Bissel v. Railroad Co., 22 N. Y. 258; Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Raft Co. v. Roach, 97 N. Y. 378; Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 80, 25 N. E. 1083, 11 L. R. A. 170; City of Buffalo v. Balcom, 134 N. Y. 532, 32 N. E. 7; Gaslight Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; Moss v. Cohen, 158 N. Y. 240, 249, 53 N. E. 8; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429.

Our attention has been called to several cases in the supreme court where a doctrine adverse to this decision has been held, but, after a full consideration of those decisions, we have reached the conclusion that they should not be followed.

DE LA VERGNE REFRIGERATING M. CO. v. GERMAN SAV. INSTITUTION.

1899. 175 U. S. 40.

BROWN, J.— * * * Our conclusion upon this branch of the case is that, as the main, if not the sole, object of the purchase from the plaintiffs was to acquire their stock in the Consolidated Company, such purchase was *ultra vires* the Refrigerating Company.

Is this defense available to the Refrigerating Company? Whatever doubts might have been once entertained as to the power of corporations to set up the defense of *ultra vires* to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that where the action is brought upon the illegal contract it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a *quantum meruit* it may be compelled to respond for the benefit actually received.

The earliest case in which this doctrine is distinctly laid down is that of Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, in which

it appears that two railroad companies, which had been consolidated, gave their promissory notes in payment for a steamboat to run in connection with the railroads. It was held that, as there was no authority in the railroad companies to engage in running steamboats, there could be no recovery on the notes, and that as the plaintiff was not the owner of the boat and had sued upon the notes as an indorsee, there could be no recovery. The same doctrine has been applied to leases *ultra vires* a corporation, and it has been uniformly held that there could be no recovery upon the lease itself, though there might be in an action for use and occupation of the property. Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 384; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48; s. c. 171 U. S. 138; McCormick v. Market Nat. Bank, 165 U. S. 538, 550; Thomas v. West Jersey R. Co., 101 U. S. 71; California Nat. Bank v. Kennedy, 167 U. S. 362; Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 116, 18 L. R. A. 252; Union P. R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564.

The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized. Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381, 398; Thomas v. West Jersey R. Co., 101 U. S. 71; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, and 630; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 25; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 384.

As the action in this case is upon the contract, and as the contract was prohibited by the charter of the Refrigerator Company, there can be no recovery upon it. * * *

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§ 53.—Where Formalities Are Not Complied With.

WOOD v. MYSTIC CIRCLE.

1904. 212 Ill. 532, 72 N. E. 783.

HAND, J.— * * * The law is well settled in this state that corporations can only exercise such powers as are conferred upon them by their charters, and that an act of a corporation not authorized by its charter is void, and the fact that the corporation has received the benefits of a contract or the party with whom it deals has

acted thereunder does not estop the corporation from raising the defense, when sued upon such contract, of *ultra vires*. When, however, the contract is within the chartered powers of a corporation but there has been a failure to comply with some regulation, or the power has been improperly exercised, if the corporation has received the benefit of the contract it may be estopped to raise that defense. (Durkee v. People, 155 Ill. 354; National Home Building and Loan Assn. v. Home Savings Bank, 181 *id.* 35.) In the last case, on page 43, in discussing the doctrine of *ultra vires*, the court said: "The term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. * * * Where an act is not *ultra vires* for want of power in the corporation but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. * * * If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it." * * *

LONG v. GEORGIA PAC. RY. CO.

1891. 91 Ala. 519, 8 So. 706.

McCLELLAND, J.— * * * Only those grounds of demurrer which present the question whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to purchase or hold the same, can have any relief in respect to the transaction, are discussed in argument, and to these our consideration will be confined; since it is manifest that a determination of this question in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action. It is thoroughly well-settled law that a party to an *ultra vires* executory contract, made with a corporation, is not estopped to set up the want of corporate capacity in the premises either by the fact of contracting, whereby the power to contract is in a sense admitted or recognized, or by the fact that the fruits or issues of the contract had been received and enjoyed; and this,

though the assault upon the transaction come from the corporation itself. Bank v. Dunkin, 54 Ala. 471; Chambers v. Falkner, 65 Ala. 448; Sherwood v. Alvis, 83 Ala. 115; Lime-Works v. Dismukes, 87 Ala. 344. But where the contract is fully executed, where whatever was contracted to be done on either hand has been done, a different rule prevails. In such case the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties' voluntary doing of what they had unlawfully agreed places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other what was parted with; the reason for which is that, since they are equally in fault, the law will help neither." Bish. Cont., § 627. The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. Morris v. Hall, 41 Ala. 510; Ingersoll v. Campbell, 46 Ala. 282; Sherwood v. Alvis, 83 Ala. 115; Dudley v. Collier, 87 Ala. 431; Craddock v. Mortgage Co., 88 Ala. 281. And this is the doctrine generally declared by other courts. Thomas v. Railroad Co., 101 U. S. 71; Day v. Buggy Co., 57 Mich. 146; Parish v. Wheeler, 22 N. Y. 494; Ditch Co. v. Zellerbach, 37 Cal. 543, 606; Terry v. Lock Co., 47 Conn. 141. There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on the both sides, left nothing to be done by either party in the premises, and brings the transaction within the principle we have been considering, which denies to complainant any relief in respect to it. The same conclusion is reached on another well-established principle. It is that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the state, the sovereign alone having the right to impeach the transaction; and, until it supervenes for this purpose, the corporation is vested with perfect title against all the world defeasible only on office found. Railroad Co. v. Proctor, 29 Vt. 93; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Goundie v. Water Co., 7 Pa. St. 233; Baird v. Bank, 11 Serg. & R. (Pa.) 411; Lathrop v. Bank, 8 Dana (Ky.) 114, 129; Hough v. Land Co., 73 Ill.

23; Cowell v. Springs Co., 100 U. S. 55; Reynolds v. Bank, 112 U. S. 405, 413; 2 Mor. Priv. Corp., § 710. The decree of the chancellor is affirmed. * * *

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§ 54.—How Corporation May Contract.

B. S. GREEN CO. v. BLODGETT.

1895. 159 Ill. 169, 42 N. E. 176.

CARTER, J.— * * * It is no longer the law that a corporation is bound by its contract only when made under its corporate seal. The rule now is, that a corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual may. Morawetz on Corp., § 338, p. 320; Cook on Stockholders, § 721, p. 1094; Muscatine Water Co. v. Muscatine Lumber Co., 85 Iowa 112; Gottfried v. Miller, 104 U. S. 521; 4 Am. & Eng. Ency. of Law, 242, and cases cited; Town of New Athens v. Thomas, 82 Ill. 259; Racine and Mississippi Railroad Co. v. Farmers' Loan and Trust Co., 49 *id.* 331; Board of Education v. Greenbaum, 39 *id.* 609.

SEAGRAVES v. CITY OF ALTON.

1851. 13 Ill. 366.

GREAT, C. J.— * * * Where the law imposes an obligation on a corporation, which it refuses to discharge, it may be held liable civilly at the suit of a party who sustains damages in consequence of its refusal. In legal contemplation, a corporation assumes to perform what its charter enjoins upon it, and it is subject to answer in a proper action for its default. And the law is now well settled, however it may have been formerly, that an action of assumpsit may be maintained against a corporation upon an implied contract. The Bank of Columbia v. Patterson's Administrator, 7 Cranch (U. S.) 299; Danforth v. Schoharie Turnpike Co., 12 Johns. (N. Y.) 227; Overseers v. Overseers, 3 Serg. & Rawle (Pa.) 117; The Baptist Church v. Mulford, 3 Halstead (N. J. L.) 182. * * *

CHAPTER V.

VOIDABLE CONSENT.

§ 55.—It is essential to an absolutely binding contract that the consent expressed by offer and acceptance should be real.

Apparent consent is not real when it is caused by such
Mistake,
Misrepresentation,
Fraud,
Duress, or
Undue Influence, as is hereafter described.

Consent is so caused when it would not have been given but for the existence of the mistake, misrepresentation, fraud, duress, or undue influence; and in such case the contract may be seasonably avoided by the innocent party.

In many of the cases under this rule the innocent party may avoid the contract either at law or in equity, but in some of them his sole remedy is in equity.

He must rescind the contract or seek the relief within a reasonable time, under the circumstances of the particular case, after knowledge of the mistake, misrepresentation, or fraud has been or ought to have been obtained, or after the discontinuance of the duress or undue influence. See Benjamin's "Principles of Contract," p. 178.

MISTAKE.

§ 56.—Mistake is a ground for avoiding a contract when it is

1. Mistake as to the nature of the transaction in the absence of negligence operating as an estoppel.

2. Mistake as to the person with whom the contract is made.

3. Mistake as to the existence of the subject-matter of the contract, or

4. Mistake as to the identity of the subject-matter of the contract.

§ 56 (1)—Mistake as to the Nature of the Transaction.

TRAMBLY v. RICARD ET AL.

1881. 130 Mass. 259.

COLT, J.—The first count in the plaintiff's declaration is for trespass to real estate, and removing the plaintiff's furniture. The second is for the conversion of the same furniture. The defendants, in justification of their acts, rely upon an alleged breach of the plaintiff's written agreement, which stated that he borrowed the furniture of them, and by which he agreed to hold the furniture as their property, paying them a weekly sum for the use of the same, with the privilege of buying it at a price named. To this contract, the plaintiff, being unable to read or write, affixed his mark. He contended at the trial that it was obtained from him by fraud, and offered to prove that, before he affixed his mark, the defendants orally agreed to sell the furniture to him at a price named, part of which was to be paid down, and the balance in instalments; that nothing was said at any time about borrowing or paying rent for it; and that, immediately after agreeing on the terms, the defendants requested him to sign the written contract, which he did, supposing the same to contain the terms and stipulations of the oral agreement. The plaintiff testified that the written agreement was not read or explained to him, and that he did not request that it should be. He admitted that the defendants made no verbal or written representations of its contents.

The judge excluded the evidence; and the only question here is whether the jury would be justified in finding from it that the written agreement was fraudulently obtained.

In the absence of fraud or imposition, it is presumed that the terms of a written contract were known and assented to by the parties who signed it; that they either read it, or were informed of its contents, or were willing to assent to its terms without reading it. This presumption is not defeated by showing that the contract signed was different from that which one or the other supposed he was signing. It is not permitted to show that another contract was the real contract, because the parties have chosen to put their agreement in writing, as the better way to preserve its terms, and parol evidence cannot be admitted to vary it. But this familiar rule does not exclude evidence which tends to show that the written contract was by some fraud or imposition never in fact freely and intelligently signed by the party sought to be charged. It may always be shown that he was not possessed of the requisite capacity, or that his signature was obtained by fraud.

Upon the question whether in this case there was evidence of

fraud which should have been submitted to the jury, the fact that the plaintiff was an unlettered person, who could not read and write, is of controlling importance. In Selden v. Meyers, 20 How. (U. S.) 506, Chief Justice Taney declared that a person dealing with an illiterate man, who could neither read nor write, and taking from him a promissory note for the payment of money, and a deed of trust to secure the payment, was bound to show that he fully understood the object and import of the writings sought to be enforced against him. A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is a fraud in one who with knowledge of the facts attempts to enforce it. Walker v. Ebert, 29 Wis. 194; Foster v. Mackinnon, L. R. 4 C. P. 704, 711.

But beyond this, the evidence offered by the plaintiff, which the jury might have fully believed, tended to show that the written contract was produced by the defendants immediately after an oral contract for the unconditional sale and delivery of the furniture was completed. The jury may well have found that the production of the writing at that time was in itself an affirmation on the part of the defendants that its terms did not differ from the terms of the sale agreed on. Fraud may be proved from the acts and conduct of a party quite as effectively as from his declarations. Emerson v. Brigham, 10 Mass. 197; French v. Vining, 102 Mass. 132; Walters v. Morgan, 3 DeG., F. & J. 718. And any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect of producing such belief to his injury, is a fraud.

We are of opinion, that the evidence offered should have been submitted to the jury, with proper instructions.

Exceptions sustained.

SWANNELL ET AL. v. WATSON.

1874. 71 Ill. 456.

CRAIG, J.—This was an action of assumpsit, brought by appellants against appellee, upon two promissory notes, bearing date July 11, 1871, due in nine months, given by appellee to Geo. W. Kenworthy, and by him indorsed to J. F. Powers, and by him to appellants.

The general issue and special pleas of failure of consideration, and that the notes were obtained by fraud and circumvention, were filed, upon which issue was taken. A trial was had before a jury, and verdict for appellee, upon which judgment was rendered. * * *

The second instruction, given for appellee, to which exception was taken, is as follows:

"The court further instructs the jury, that if they believe, from the evidence, that, at the time said notes were signed by Watson, he was uneducated, and unable to read the same, and that he told the person who procured the same to be signed, that he was unable to read the said notes, and requested him to read the same, and that the person aforesaid read said notes as being instruments securing said Kenworthy against loss by reason of furnishing machines to said defendant, and certifying that said defendant was the owner of the land in said notes described, and by thus wrongfully reading said notes said person procured the execution of the same, then the act of so doing was fraud and circumvention, and plaintiffs are not entitled to a recovery upon said notes."

It appears, from the evidence of appellee, that two of his neighbors were present, a part of the time, when he was contracting with Kenworthy, and at the very time he executed the notes they were on his premises, near by. He could have easily called upon them to read the papers for him, before he executed them. This he failed to do, but placed implicit confidence in Kenworthy, a man he had never seen before, and knew nothing of him, and allowed himself to be imposed upon by the false reading of this utter stranger.

This cannot be regarded as the use of diligence and proper precaution on the part of appellee. Due care required that he should have called upon those who were near by, and in whom he could rely to read the papers for him. Had he done this, the notes would not have been executed and placed in circulation. Through his own neglect these notes have been purchased by the plaintiffs, innocent purchasers, in the usual course of trade, and it would be manifestly unjust that they should bear the loss, when appellee, by the exercise of reasonable precaution, could have known whether the papers he executed were promissory notes or some other papers.

The instruction given entirely ignores any care and diligence on the part of appellee, and for that reason is erroneous. Leach v. Nichols, 55 Ill. 273.

There was evidence before the jury that tended to prove appellee could, by the use of reasonable diligence, have had the notes properly read to him, and known their contents, before he executed them. This testimony was, in effect, excluded from the consideration of the jury by the instruction.

For the error indicated, the judgment will be reversed and the cause remanded.

Judgment reversed.

RICHARDSON v. SCHIRTZ ET AL.

1871. 59 Ill. 313.

THIS was a suit brought by Charles R. Richardson, as assignee of Thomas Meighan, against Andrew Schirtz and Henry Hershberger, upon a promissory note for the sum of $50.55, written in the English language, executed by the defendants in favor of Meighan, and assigned by the latter to the plaintiff. The circuit court rendered judgment for the defendants, and the plaintiff appeals.

PER CURIAM:—This was an action originally brought before a justice of the peace, in favor of an assignee, before maturity, upon a promissory note, for the sum of $50.55, signed by Schirtz and by Hershberger as his surety.

On the trial of the cause in the court below, on appeal, evidence was given tending to show that at a public sale, had by Thomas Meighan, the payee of the note, Schirtz purchased "hedge plants" to the amount of $5.50; that the clerk of the sale wrote the note, and told the signers at the time they signed it, in the presence and hearing of the payee, that it was for the sum of $5.50, and 5 cents for a stamp, making in all $5.55; that in the belief of the statement of the clerk, that the note was for the sum of $5.55, and not knowing that it was for the sum of $50.55, the note was signed.

There was also evidence tending to show that the signers of the note could not read English.

The evidence tended to make out a case, not merely of fraud relating to the consideration of the note, but of fraud and circumvention in obtaining the making or executing of the note, which, under our statute, avoids the note in the hands of a *bona fide* assignee before maturity. Easter v. Minard, 26 Ill. 495.

We have carefully examined the evidence, and are unable to say that it does not sustain the verdict.

And we do not perceive any substantial error in the giving or refusing of instructions. There being no other errors assigned, the judgment of the court below must be affirmed.

Judgment affirmed.

METCALF v. METCALF.

1893. 85 Me. 473, 27 Atl. 457.

FOSTER, J.—This case is before the court on appeal from a decree in favor of the plaintiff, based upon the verdict of a jury.

The issue of fact framed and submitted to them was whether the deed mentioned in the plaintiff's bill was obtained by the defendant by fraud and deceit. * * *

The testimony in this case is absolutely insufficient to prove fraud or deceit on the part of this defendant in obtaining the deed in controversy. The testimony of both parents shows that he had assisted them for many years. No reason is shown for any attempt to practice deceit or fraud upon them, and no such fraud or deceit is disclosed from the evidence as would be necessary to render the deed invalid.

Great stress is placed upon the fact that the deed was not read to or by the plaintiff and his wife at the time it was signed by them. If the plaintiff signed the deed,—and we have no doubt of it, from the evidence before us,—then the fact that he was ignorant of its contents cannot avail him. If he neglected to read it, or to ascertain its contents, it was rather his own negligence than the fraud of the defendant. No deception was practiced upon him. He was under no restraint or coercion. He was neither ignorant nor illiterate, although physically disabled. His eyesight was good, and he was able to read writing readily, as his own testimony shows, even without the aid of glasses; and no reason is suggested why he might not have read the deed, and fully understood it, had he so desired. He did not request it to be read, nor was he misled by having the contents of it falsely stated to him. There is no principle of law or equity upon which he can avoid this deed, upon the facts presented in this case. "If the party can read, it is not open to him, after executing it, to insist that the terms of the deed were different from what he supposed them to be when he signed it. Nor could one who is unable to read be admitted to object that he was misled in signing a deed, unless he had requested to hear it read, and this had not been done, or a false reading had been made to him, or its contents falsely stated." 2 Washb. Real Prop. 576; Thompson v. Ela, 58 N. H. 490, 492. Were it not for the fact that the intervention of the court is strenuously invoked on the ground that the plaintiff had no knowledge of the purpose and effect of such deed, and therefore that the deed should be decreed to be void, we should not consider it necessary to refer to any further authorities in support of the doctrine already laid down. But the principle seems to be well established by the decisions of different courts. Withington v. Warren, 10 Met. (Mass.) 431, 434; Hallenbeck v. Dewitt, 2 Johns. (N. Y.) 404; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240; Rossetter v. Simmons, 6 Serg. & R. (Pa.) 452; Taylor v. King, 6 Munf. (Va.) 358; Devl. Deeds, § 225; 1 Story Eq. Jur., § 146; 2 Pom. Eq. Jur., § 892. A title by deed would be of little value, if it could be avoided for that reason. Grant v. Grant, 56 Me. 573. Nor is it sufficient proof of fraud in obtaining it, as the foregoing authorities decide. Fraud is not to be presumed. It must be established by proof. This rule obtains as well in equity as in law. Abbott v. Treat, 78 Me. 121, 3 Atl. 44. The charge in the bill is fraud and deceit in obtaining the deed. It was incumbent on the plaintiff to sustain the charge by legitimate

evidence. The evidence does not support the verdict, and we feel that it should not be regarded as the basis of a decree in favor of the plaintiff, nullifying the deed.

Verdict set aside. Decree reversed. Bill dismissed, with costs.

ANDERSON v. WARNE.

1873. 71 Ill. 20.

SCOTT, J.—The note which is the foundation of this action was made by plaintiff in error and Paul Brusher, and by its terms was payable to defendant in error. It is sought to avoid the payment, on the ground the note was obtained by fraud and circumvention. This defense cannot be maintained. The wrongful conduct shown was between the makers, and was not participated in by the payee. He was guilty of no fraudulent practices whatever. Brusher applied to him for the loan of $100, and proposed to give Gunner Anderson as security. At first the proposition was declined, but on further entreaty it was agreed he would give Brusher $96 for his note for $100, payable in ninety days, with Anderson as security. The note was procured, and the money paid over to Brusher. The payee had no reason to suspect it was not a fair transaction. There was nothing in the circumstances even to excite suspicion in the mind of any one, however careful. He had seen Brusher but a few days before, at Anderson's house, when Anderson had spoken of him as his friend, and inquired if he did not recollect him. Defendant in error had had frequent small business transactions with Brusher, and there was nothing unusual in offering to sell the note in controversy.

It is claimed, plaintiff in error was deceived into signing the note; that Brusher represented to him it was an "identity paper," to enable him to procure his bounty money from defendant in error.

It is difficult to reconcile this theory of defense with good faith. Plaintiff in error knew Warne and Brusher were personally acquainted, and had previously had business transactions together. How he could have been deceived by the pretense that Brusher wanted an "identity paper," to present to a man with whom he was well acquainted, is not explained by any evidence. But if it be conceded Brusher was guilty of fraudulent practices in procuring the execution of the note, and that he obtained its execution under the belief it was an "identity paper," this fact would not change the decision. There was no fraud on the part of the payee, and his rights cannot be affected by any fraud practiced between the makers of the note. The statute only renders the note void when the payee commits, procures, or has knowledge of the fraud before he receives the

instrument. He must have participated in the wrongful conduct. Where the payee is free from all fraud or participation in procuring the execution of the instrument, he cannot be held responsible for the wrong inflicted, but it is otherwise when he is, by any means, a party to it. Easter v. Minard, 26 Ill. 494; Young v. Ward, 21 Ill. 223.

The evidence shows, plaintiff in error was himself guilty of negligence, and hence must bear the consequences resulting from his conduct. The rule of law is, where one of two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it. It is his duty to use reasonable and ordinary precaution to avoid imposition, for it is against reason that a party who stands fair should suffer for the negligent conduct of another. Leach v. Nichols, 55 Ill. 273; Harvey v. Smith, 55 Ill. 224; Taylor v. Atchison, 54 Ill. 196; Mead v. Munson, 60 Ill. 50.

The note was written in English, and plaintiff in error claims that neither he nor his wife, who were the only persons present except Brusher, could read it. The proof shows his daughter, who was a member of his family, could read English. She was temporarily absent, only a half mile distant. He ought to have awaited her return, which would have been but a short time, and had the instrument read before he signed it, and it was negligence not to do so.

The instructions given for defendant in error were substantially correct, and were such as the nature of the case required. Those refused stated the law differently from what we hold it to be, and for that reason were properly refused.

No error appearing in the record, the judgment is affirmed.

Judgment affirmed.

Whether a person able to read is liable on a negotiable instrument in the hands of an innocent holder for value, where his signature thereto was obtained by some trick or artifice, depends upon whether he did or did not exercise reasonable prudence in signing the instrument. See Benjamin's "Principles of Contract," p. 182.

TOWN OF OREGON v. JENNINGS.

1886. 119 U. S. 74.

THIS was an action at law brought by Eliza Jennings, as assignee, against the Town of Oregon to recover $13,510, the amount payable by 193 coupons of $70 each, cut from 24 bonds for $1,000 each, purporting to have been issued by that town. They were signed by Fred H. Marsh, Town Clerk, and E. S. Potter, Supervisor.

BLATCHFORD, J.— * * * The statute of Illinois as to fraud and circumvention, set up and relied on (by defendant) is as follows: "11. If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid" (that is, any note, bond, bill or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions), "such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument." Rev. St. Ill., Ch. 98, § 10.

The court refused to submit to the jury, and we think properly, any question as to whether the making or execution of the bonds and coupons was obtained by fraud or circumvention.

Even if the statute applies to town bonds and their coupons, no fraud or imposition was practiced on Potter or Marsh to induce them to sign these bonds and coupons. They knew what they were signing and signed intentionally. The fraud or circumvention intended by the statute, which only embodies a rule of the common law, is not that which goes merely to the consideration of the instrument, but it must go to the execution or making; and there must be a trick or device by which one kind of instrument is signed in the belief that it is another kind, or the amount or nature or terms of the instrument must be misrepresented to the signer. No different ruling as to the statute has ever been made by the Supreme Court of Illinois, especially in a case where, as here, the holder of the instrument is a *bona fide* holder of it, before maturity, for a valuable consideration, without notice. In Latham v. Smith, 45 Ill. 25, decided in 1867, in construing this statute, the court said: "A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it, when he did not intend to do such an act. Circumvention seems to be nearly if not quite synonymous with fraud. It is any fraud whereby a person is induced by deceit to make a deed or other instrument. It must be borne in mind that the fraud or covin must relate to the obtaining of the instrument itself, and not to the consideration upon which it is based. It is no fraud which relates to the quality, quantity, value or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character; such as giving a note or other agreement for one sum or thing, when it is for another sum or thing; or as giving a note under the belief that is a receipt." This ruling was followed in Shipley v. Carroll, 45 Ill. 285; Elliott v. Levings, 54 Ill. 213; and Maxey v. Williamson Co., 72 Ill. 207. * * *

§ 56 (a)—Mistake as to the Person With Whom the Contract is Made.

BOSTON ICE CO. v. POTTER.

1877. 123 Mass. 28.

CONTRACT on an account annexed for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial. Trial without a jury. Judge ruled that plaintiff could not maintain this action. Exceptions.

ENDICOTT, J.—To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed

by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray (Mass.) 536, 642; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 H. & C. 803; Humble v. Hunter, 12 Q. B. 310; Robson v. Drummond, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen (Mass.) 74; Orcutt v. Nelson, *ubi supra;* Mitchell v. Lapage, Holt N. P. 253.

There are two English cases very similar to the case at bar. In Schmaling v. Thomlinson, 6 Taunt 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

ORCUTT v. NELSON.

1854. 1 Gray (Mass.) 538.

SHAW, C. J.— * * * This is the case of a country merchant, sending an order for goods to a person supposed to be in business; but in consequence of a change, the order is executed by another person. Upon this alone, the defendant would not have been bound, because he had made no proposal to the plaintiff, and he had a right to decide for himself with whom he would deal. But on being notified of this change, he assents to it and ratifies it; such ratification relates to the original order, and gives it the same effect, as if originally addressed to him. The letter accompanying the invoice, addressed to the defendant by the plaintiff, distinctly informed the defendant of the execution of the order by the plaintiff, and of his forwarding of the goods by the railroad to Greenfield, the receipt of the goods at Greenfield pursuant to this notice, and payment of the freight, are decisive proof of the assent of the defendant to the change in the execution of the order, and a ratification of the act of the plaintiff. * * *

BARKER ET AL. v. DINSMORE.

1872. 72 Pa. St. 427.

THIS was an action of replevin brought by Dinsmore.

A man representing himself connected with Barker & Co. contracted with Dinsmore for wool for them, to be consigned to them to Pittsburg and paid for there. The man representing to Barker & Co. that he was Dinsmore's son, contracted to sell them wool; it arrived at Pittsburg before Dinsmore; was delivered to the man, and by him to Barker & Co., who paid him. * * *

WILLIAMS, J.—The verdict of the jury establishes the fact that the plaintiff below did not sell the wool to the defendants' vendor, as an individual, on his own responsibility, but as a member or agent of the defendants' firm, and upon their credit. Nor was the wool delivered to him by the plaintiff. It was delivered to the railroad

company, to be carried to Pittsburg, and there delivered to defendants, to whom it was consigned by the plaintiff. Under the contract of shipment the company had no right to deliver the wool to any person except the consignees; and their delivery of it to the defendants' vendor vested in him no property or right of possession as against the plaintiff. The principle which underlies this case, and by which the rights of the parties are to be determined, is this: The sale of goods by one who has tortiously obtained their possession without the owner's consent, vests in the purchaser no title to them as against the owner. As a general rule no man can be divested of his property without his own consent and voluntary act. It is true that there are exceptions to the rule, as clearly defined and as well settled as the rule itself, but this case does not come within any of them. Here the defendants' vendor, as we have seen, acquired no right or title to the wool under his contract with the plaintiff, and he did not obtain from him its actual possession. The railroad company had no authority, as the plaintiff's agent, to deliver the wool to him, and their delivery gave him no right or title to it whatever. Nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear, then, that he could convey no title by its sale; and if so, the defendants could acquire no title by its purchase, though they purchased it for a fair and valuable consideration, in the usual course of trade, without notice of the plaintiff's ownership, or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler, who had no authority to act for either. But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it. The case was tried on this principle, and as there is no error apparent in the record, the judgment must be affirmed.

EDMUNDS v. MERCHANTS' TRANSPORTATION CO.

BENNETT ET AL. v. SAME.

ABORN ET AL. v. SAME.

1883. 135 Mass. 283.

THREE actions of tort, with counts in contract, against a common carrier, to recover the value of certain goods entrusted to the defendant by the plaintiffs, at Boston, for carriage to Dayton, Ohio.

MORTON, C. J.—These three cases were tried together. In some features they resemble the case of Samuel v. Cheney, *ante,* 278. In

other material features they differ from it. They also in some respects differ from each other. In two of the cases, a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practiced any other deceit to induce the vendor to sell.

In Cundy v. Lindsay, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages and who was the person to whom the plaintiffs sent them. Dunbar v. Boston & Providence Railroad, 110 Mass. 26. The learned judge who tried the cases in the superior court based his charge upon a different view of the law; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a

brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner. Hardman v. Booth, 32 L. J. (N. S.) Ex. 105; Kingsford v. Merry, 26 L. J. (N. S.) Ex. 83; Barker v. Dinsmore, 72 Pa. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

Exceptions sustained.

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§ 56 (3)—Mistake as to the Existence of the Subject-Matter of the Contract.

GIBSON v. PELKIE.

1877. 37 Mich. 380.

ASSUMPSIT. Plaintiff brings error.

GRAVES, J.—The right Gibson asserts is based solely on an alleged special agreement entitling him to collect so much as he might of a specific judgment and to retain one-half of the sum collected. According to his own statement of his case, the judgment was the exclusive subject-matter of the agreement relied on. No other demand or form of demand entered into the bargain. The parties had nothing else in their minds. They did not assume to contract about an unliquidated claim or an unadjudicated cause of action, the enforcement of which in Pelkie's name might involve him in a much larger liability than would be likely to attend the collection of a judgment. It was a judgment which formed the subject-matter of the bargain. Such was the claim made by the declaration, and such was the case in issue. No other ground for recovery appears. Now, there was no proof of a judgment; but there was evidence concerning one, and it seems to have been in effect conceded that there was something which had been taken to be a judgment, but which was so defective that it could not avail anything.

The case must be viewed as it is. It is not admissible to arbitrarily admit one part and reject another. If what there is to show that the supposed judgment was void, is rejected, then all there is to make out the existence of any such judgment will be stricken out, and if that be done there will be no proof whatever of the essence of the cause of action set up. There will be no showing that there was any subject-matter for the alleged agreement and no proof to maintain the actual averments of the declaration. The cause is presented here by both sides upon the theory that there was something which was intended as a judgment, but which was void and hence uncollectible, and the plaintiff in error cannot ask a more favorable view of the record. If then there was a proceeding which was meant to be a judgment, but which was void, there was nothing to which the actual bargaining could attach. There was no subject-matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance, there was no substance. They made no contract because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract, had no existence. Allen v. Hammond, 11 Pet. (U. S.) 63; Suydam v. Clark, 2 Sandf. (N. Y.) Super. Ct. 133; Gove v. Wooster, Lalor's Supp. to Hill & Den. 30; Smidt v. Tiden, L. R. 9 Q. B. 446, 9 Eng. 379; Couturier v. Hastie, 5 H. L. 673; Hazard v. New England Ins. Co., 1 Sumn. (U. S.) 218; Silvernail v. Cole, 12 Barb. (N. Y.) 685; Sherman v. Barnard, 19 Barb. (N. Y.) 291; Metcalf on Cont. 30, 31; 1 Poth. Ob. by Evans 113; Benjamin on Sales, §§ 76, 77, ch. 4; 2 Kent Com. 468. It is therefore the opinion of a majority of the court that the judgment in Pelkie's favor ought not to be disturbed.

HUTHMACHER v. HARRIS' ADMINISTRATORS.

1861. 38 Pa. St. 491.

HUTHMACHER purchased at an administrator's sale a "drill machine" which unknown to the parties contained money and other valuables secreted therein by the decedent. This was an amicable action of trover and conversion to try the title thereto. The jury found for the administrators and judgment was entered on the verdict.

WOODWARD, J.—The ground on which we affirm this judgment is, that there was no sale of the valuables contained in the block of wood, which is called, in virtue of its horizontal wheel and upright spindle, "a drill machine." Sale, said Mr. Justice Wayne, in Williamson v. Berry, 8 How. (U. S.) 544, is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to

pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold.

That no such contract was made by these parties in respect to the contents of the drill machine, we deduce from the agreed facts of the case. The machine itself, and every essential part and constituent element of it, were well sold. The consideration paid, though only fifteen cents, was in law a *quid pro quo,* and the sale, unaffected by fraud or misrepresentation, passed to the purchaser an indefeasible right to the machine and all the uses and purposes to which it could be applied. But the *contents* of the machine are to be distinguished from its constituent parts. They were unknown to the administrators, were not inventoried, were not exposed to auction, were not sold. Of course they were not bought. All that was sold was fairly bought, and may be held by the purchasers. The title to what was not sold remains unchanged. A sale of a coat does not give title to the pocket-book which may happen to be temporarily deposited in it, nor the sale of a chest of drawers a title to the deposits therein. In these cases, and in many others that are easily imagined, the contents are not essential to the existence or usefulness of the thing contracted for, and, not being within the contemplation or intention of the contracting parties, do not pass by the sale. The contract of sale, like all other contracts, is to be controlled by the clearly ascertained intention of the parties. * * *

Judgment affirmed.

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§ 56 (4)—Mistake as to the Identity of the Subject-Matter of the Contract.

STONG v. LANE.

1896. 66 Minn. 94, 68 N. W. 765.

ACTION by Stong. Verdict for plaintiff. Order refusing a new trial. Appeal.

MITCHELL, J.—While the amount in controversy is small, the principle involved is important. The facts are practically undisputed. The plaintiff being desirous of purchasing a lot as a site for a dwelling, a mutual acquaintance of the parties (but for whose acts defendant was in no way responsible) pointed out to plaintiff a lot which he said defendant had for sale. The lot thus pointed out fronted east on Third avenue south, being the second lot north from Franklin avenue, in Minneapolis. The party was mistaken. The lot which defendant had for sale (as agent for the owner) was the one directly opposite on the other side of Third avenue, being the side "Judge Jones' house is on." This lot fronted west. It was also the

second lot north from Franklin avenue, but, as already stated, on the opposite side of Third avenue from the one pointed out to plaintiff. Thereupon plaintiff went to see defendant. The precise words by which he opened negotiations do not clearly appear, but their substance was that plaintiff either asked defendant if he had for sale a lot on Third avenue south, or stated that a lot had been pointed out to him by this mutual acquaintance as one that defendant had for sale, and inquired the price. The evidence is undisputed that defendant told plaintiff that he had for sale the lot on Third avenue south, being the second lot north of Franklin avenue, and "on the same side of the street Judge Jones' house was on." Nothing was said as to whether the lot fronted east or west. It is undisputed that Judge Jones' house is on the east side of Third avenue, and hence that a lot on that side would front west. Without defendant's giving any further or more definite description of the lot, and without plaintiff making any further inquiry as to its description and location, the plaintiff proceeded to negotiate as to price. The result was a verbal bargain of sale and purchase for $2,500, of which plaintiff paid down $100, the balance to be paid when the title was ascertained to be satisfactory, and upon defendant's procuring the proper deed. It appears that defendant's arrangement with the owner of the lot was that he was to have as his commission all he sold the lot for over $2,500. But, without waiting for the sale to plaintiff to be consummated, defendant immediately went to the owner, and himself bought the lot for $2,400, paying on the purchase price the $100 which he had received from plaintiff, and taking a deed running directly to the plaintiff. Very soon afterwards, on submitting to his counsel the abstract of title furnished by the defendant, plaintiff discovered that the lot described in it was not the lot which had been pointed out to him, and which he supposed he was buying. He then informed the defendant of his mistake, and demanded back his $100, which defendant refused to pay, but tendered a deed which plaintiff refused to accept, and then brought this action to recover back the $100. The evidence is undisputed that plaintiff was laboring under an honest mistake, and supposed he was buying the lot which had been pointed out to him. It is also undisputed that defendant was equally honest in supposing he was selling the lot on the other side of the street, for which he was agent, and that he had no notice of plaintiff's mistake. It will be observed that the description of the two lots was the same except the reference to "the side of the street Judge Jones' house is on," which was applicable to the lot defendant had for sale, but inapplicable to the one which plaintiff supposed he was buying. It is familiar law that an honest mistake of one of the parties may be good ground for refusing specific performance, and leaving the other party to his action for damages, while it would be no ground for a rescission of the contract. But the question here is whether,

upon the facts, plaintiff is entitled to a rescission, for that is, in effect, what he is asking for in seeking to recover the $100.

The trial judge instructed the jury to the effect that, to constitute a contract, the minds of the parties must have met—that is, as applied to this case, both parties must have had in mind the same lot; that if one of them referred to one lot, and the other to another lot, then there was no meeting of the minds of the parties, and hence no contract. Considered as a statement of the general rule of law, this might be incomplete and even incorrect. If there be a meeting of the minds upon the terms of the contract, and those terms are free from ambiguity, and there be no fraud or misrepresentation, a mistake of one of the parties only, resting wholly in his own mind, as to the identity of the subject-matter of the contract, was never held in any well-considered case to be a ground for rescission. If it was, then all contracts would rest on a very uncertain foundation. Undoubtedly, in order to create a contract, the minds of the parties must meet and agree upon the expressed terms of the contract. Thus, in Rupley v. Daggett, 74 Ill. 351, one party offered to sell a horse for $165; the other party understood him to say $65. It was held that there was no contract. To the same head may be referred cases where a person, by mistake, enters into a different kind of agreement from that which he intended to make or supposed he was making; as where he signed a bond supposing it to be a mere petition, or which he supposed he was signing merely as a witness. See Thoroughgood's Case, 2 Coke 9; Foster v. McKinnon, L. R. 4 C. P. 704. To the same general principle may be referred those cases where, after the parties have apparently agreed to the terms of a contract, it is made to appear that there was a latent ambiguity in an essential word, by which one of the parties meant one thing, and the other a different thing, the essential word being applicable to both. See Raffles v. Wichelhaus, 2 Hurl. & C. 906; Kyle v. Kavanaugh, 103 Mass. 356. In all these cases it was held there was no binding contract, because the minds of the parties had never met on its terms. But suppose, in Raffles v. Wichelhaus, there had been but one ship named Peerless, and hence no latent ambiguity in the terms of the contract; the defendant could not have been released from his contract merely because he had in mind, and supposed he was contracting with reference to, another ship of a different name. * * * We do not wish to be understood as endorsing the erroneous meaning not infrequently attached to the legal maxim that, to create a contract, the minds of the parties must meet and "agree on the same thing in the same sense." * * *

Order affirmed.

EVERSON ET AL. v. INTERNATIONAL GRANITE CO.

1893. 65 Vt. 658, 27 Atl. 320.

ASSUMPSIT by Everson & Co. against the International Granite Company. Plea, the general issue. Judgment for the defendant. The plaintiffs except.

It appeared from the findings of fact and the letters referred to that the plaintiffs contracted with the defendant to furnish them two granite monuments for $115 each; that the contract was made on the part of the defendant by its treasurer, who at that time was unacquainted with the business, had no personal knowledge of the price of what he was selling, but relied upon the estimate of his foreman for that information, and so informed plaintiffs at the time the contract was made; that the price given by the foreman was, owing to some mistake, the nature of which did not clearly appear, $100 too small on each monument, and that the plaintiffs contracted with knowledge of this mistake.

MUNSON, J.—It is said in the statement of facts that the contract sued upon was made by a member of the defendant firm who had no personal knowledge of the prices of monuments, and who was acting under a mistake of fact as to the price of the monuments sold. Certain letters of the defendant firm, written after the making of the contract, are referred to as a part of the statement of facts. We understand this to mean that the letters are embodied in the statement as showing the nature of the mistake, and how it can be made. It appears from the letters that the sale was made at prices given by the defendant's foreman, and that the mistake occurred in his estimates. The partner's ignorance of the prices of the goods sold by his firm is not the controlling feature of the case. The rights and liabilities of the proprietor of a business are not to be determined solely from a consideration of the knowledge which he personally has of the business. He is entitled to conduct a business of which he is ignorant, in reliance upon the experience and knowledge of an employe. In a business thus conducted, the mistake of the employe is not to be imputed to the ignorance of the proprietor. The member of the defendant firm who concluded this contract did not undertake to transact the business upon his own knowledge, but acted solely upon the estimates furnished by the foreman. The firm is entitled to the same relief from the consequences of a mistake made by its foreman that it would have been entitled to if the foreman had been a member of the firm, and had closed the contract himself. The determination of the case depends upon the view which may be taken of the mistake made by the foreman. The mistake in this case is certainly not identical with that in Harran v. Foley, 62 Wis. 584, 22 N. W. 837. There the error was in failing to give the price which the seller had decided upon. The seller had certain figures in mind,

and intended to give them, but by a mere slip of the tongue, which the buyer understood to be such, he gave other figures. While thinking of one thing he said another, and the buyer knew that what he said was not what he had in mind. In this case there was no difficulty in holding that the minds of the parties did not meet upon the price named. The mistake relied upon in Griffin v. O'Neil, 48 Kan. 117, 29 Pac. 143, differed somewhat from the one above considered. In this case the vendor claimed that his price was determined by footing incorrectly an itemized valuation of the property offered for sale, and that the buyer was looking upon the paper while he was making the addition. Here the vendor gave the figures he intended to give, but the figures were the result of an error in his computation. The court was of opinion that the buyer could not take advantage of a miscalculation of this character, of which he had knowledge. A similar mistake was considered in Webster v. Cecil, 30 Beav. 62, which was a suit for specific performance. The defendant, who had already refused to sell certain land to the plaintiff's agent for $2,000, wrote the plaintiff, offering to sell it for $1,100; and the plaintiff at once mailed an acceptance of the offer, on reading which the defendant discovered his mistake. The property consisted of five parcels, the total price of which the defendant arrived at by placing a valuation upon each parcel, and adding the several items. By failing to carry one from the third column, he made a footing of $1,100, instead of $2,100; and in his haste to dispatch the offer by the first post he incorporated this footing into his letter, without noticing the error. The court refused to decree specific performance. The mistake in the case at bar was not, as in the case first cited, the unconscious statement of a price different from the one determined upon. The defendant's foreman gave the figures he had determined upon. The mistake lay in the process by which he arrived at the figures given. It is not fully stated what the nature of his mistake was. If it sufficiently appears that it was merely an error in computation, the case cannot be distinguished from the other two cases cited. It is evident that the doctrine of these cases cannot be extended to cover those mistakes which result from the vendor's ignorance of his business. The law does not undertake to so regulate the transactions of men that one who is thoroughly informed shall obtain no advantage over one who is not. The buyer is not obliged to disclose to the seller his better knowledge of the cost or market value of the property he proposes to buy. His purchase will be valid notwithstanding his knowledge that the seller is acting under an erroneous belief in regard to some matter which enters into the determination of the price. A dealer is expected to know the amount and cost of the material and labor required for the article which he contracts to deliver. An error which rests in the vendor's want of judgment or information in these matters must be carefully distinguished from those of the character above indicated. The court below found that

the agreement to furnish the monuments was the result of a mistake as to the price, and rendered judgment for the defendant. It nowhere appears that the mistake was due to the foreman's ignorance of the business. The term used is more naturally applied to errors of computation and oversight, and was doubtless employed by the court as properly and sufficiently descriptive of such an error. And when it is considered that the difference was nearly half the actual price, and an even $100, there seems to be no room to doubt that the foreman's error was such as were made in Griffin v. O'Neil and Webster v. Cecil, above cited. In any event, it must be so treated as the case stands; for, the court having found that the defendant acted under a mistake, and rendered judgment in his favor, it is to be presumed, nothing appearing to the contrary, that the mistake found was such as justified the judgment. Poultney v. Glover, 23 Vt. 328; Burton v. Barlow's Estate, 55 Vt. 434; Spaulding v. Warner, 57 Vt. 654; Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013: It appearing, then, that the error in the foreman's estimates was one of computation and oversight merely, and that the mistake was known to the plaintiffs, we hold that the suit cannot be maintained.

Judgment affirmed.

SHERWOOD v. WALKER ET AL.

1887. 66 Mich. 568, 33 N. W. 919.

REPLEVIN for a cow. Verdict and judgment for plaintiff. Defendants bring error.

MORSE, J.— * * * It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured the possession of the animal, the defense learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material

fact—such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake Cont. 339; Story Sales (4th ed.), §§ 148, 377. See also, Cutts v. Guild, 57 N. Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen (Mass.) 492, 12 Allen (Mass.) 44; Huthmacher v. Harris's Adm'rs, 38 Pa. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. (U. S.) 63-71.

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold—then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580, 587. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time and for its present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that

there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted.

HECHT ET AL. v. BATCHELLER ET AL.

1888. 147 Mass. 335, 17 N. E. 651.

ACTION to recover back the price paid for a promissory note.

MORTON, C. J.—The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through a broker to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made "a voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which state they were residents. Neither of the parties to this suit, nor the broker employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. * * *

It is a general rule that where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may, upon discovery of the mistake, return it, and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. Gardner v. Lane, 9 Allen (Mass.) 492, 12 Allen (Mass.) 39; Spurr v. Benedict, 99 Mass. 463; Iron Co. v. Insurance Co., 134 Mass. 433; 1 Benj. Sales, § 54. In the case at bar, the subject-matter of the contract was the note of J. & S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or

misapprehension affects the value of the note, and not its identity. Day v. Kinney, 131 Mass. 37. In the case of Day v. Kinney, *ubi supra,* the makers of the note sold were in fact insolvent, but they had not stopped payment, or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The makers of the note had made an assignment for the benefit of their creditors; but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality. We are therefore of opinion that the sale was valid, and that the plaintiffs cannot recover the amount they paid as upon a failure of consideration. * * *

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§ 57.—Mistake as to Law.

FOWLER v. BLACK ET AL.

1891. 136 Ill. 363, 26 N. E. 596.

IN this case it was claimed by a cross-bill that the word "heirs" was used in a deed of conveyance, by mistake, for the word "children."

BAILEY, J.— * * * There is no pretense that said grantors, at the time they executed said deed, were not fully aware of its terms and language, or that they were in any way deceived, misled or otherwise imposed upon, or subjected to any undue or improper influence. It is not claimed that they did not read the deed before executing it, and the legal presumption that they did so must therefore prevail. It must be assumed then as a fact as to which there can be no dispute, that the grantors, when they executed the deed, knew that the word "heirs" was used and that the word "children" was not used. Nor is it claimed that the conveyancer or any other person gave them any advice as to the legal effect of the word thus employed, or as to whether the deed would give effect to their intentions or not.

It is clear then that the mistake complained of is not a mistake as to any fact, but simply as to the meaning and legal effect of the word "heirs" when used in a conveyance of the title to land. This, manifestly, is purely a mistake of law. The general rule, subject it is true to certain exceptions, is, that courts of equity will not lend their aid to relieve against mere mistakes of law. Mr. Justice Story, in dis-

cussing the rule and its exceptions, after analyzing and reviewing at considerable length the leading decisions bearing upon the question, reaches the conclusion that the rule is relaxed in cases where there is a total ignorance of title founded in a mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence or surprise. "But," says the learned author, "it may be safely affirmed, upon the highest authority, as an established doctrine, that a mere naked mistake of law, unattended by any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity." 1 Story's Eq. Jur., §§ 137, 138.

The general rule above laid down has been frequently recognized and enforced by this court. Thus, in Sibert v. McAvoy, 15 Ill. 106, a bill was filed to reform a contract after the complainant had made certain unsuccessful attempts to enforce it at law, it being alleged in the bill that a mistake had been made in its phraseology by the person employed to write it. In denying the complainant relief, this court said: "If he misconstrued the contract as written, that was a mistake of law and not of fact, and for such mistakes equity can grant no relief. It is where parties intended to insert words in a contract which were by accident omitted, that equity can reform the contract by inserting them, or by expunging words they did not intend to have inserted. If the words are written as the parties intended they should be written, or supposed they were written, when they signed the contract, no matter how much they may be mistaken as to the meaning of those words, no relief can be granted either at law or in equity. The construction of words is a matter of law. The insertion of words is a matter of fact. It is for mistakes of fact alone that contracts may be reformed."

In Goltra v. Sanasack, 53 Ill. 456, the complainant's father, in his lifetime, purchased certain lands and had them conveyed by the vendor to his wife and her heirs. After his death, the complainants, who were his children by a former wife, filed their bill to reform said deed, alleging that her father intended to have said lands conveyed to his wife and his said children, and supposed that the grantor had so conveyed them, but that, contrary to such intention, the conveyance was in fact made to said wife and her heirs. In denying the relief thus prayed for, we said: "The rule is inflexible that a mistake or misapprehension of law is never relieved against or corrected. If a party designs to and performs an act under a mistaken view of the law affecting the transaction, he is held to the obligation incurred. As a matter of necessity, all persons are presumed to know and act in view of the law, and the maxim is that ignorance of the law excuses no one." Many other decisions may be referred to in which the rule under consideration is discussed in its various aspects, among which are the following: Broadwell v. Broadwell, 1 Gilm. (Ill.) 599; Beebe v. Swartwout, 3 *id.* 162; Shafer v. Davis, 13 Ill. 395; Camp-

bell v. Carter, 14 *id.* 286; Gordere v. Downing, 18 *id.* 492; Wood v. Price, 46 *id.* 439; Sands v. Sands, 112 *id.* 225; Bonney v. Stoughton, 122 *id.* 536. * * *

JORDAN v. STEVENS ET AL.

1863. 51 Me. 78.

DAVIS, J.— * * * It is quite true, as Judge Redfield, observes (1 Story's Eq., § 130, note), "that the distinction between mistakes of law, and mistakes of fact, so far as equitable relief is concerned, is one of policy rather than of principle." And yet it may not be the less necessary to maintain and observe it. No government could be administered at all, under which ignorance of the criminal law should be held a sufficient excuse for violating it. And the same principle is applicable to the civil law. This is not on the ground that every one is presumed to know the law. For though this is often repeated as an axiom, a presumption so variant from the truth cannot be recognized by the law. The ground on which the doctrine rests is this,—that it is impossible to uphold the government, and so to maintain its administration as to protect public and private rights, except on the principle that the rights and liabilities of every one shall be the same as if he knew the law.

If all contracts made in ignorance of the law were to be held invalid, there would be no certainty in business, and no security in titles. All rights of property would be endangered; and the most important encouragements for industry and enterprise would be taken away. It is indispensable, therefore, that the obligation of contracts should be maintained, unless there is some stronger reason for annulling them than a mere mistake of the law. Champlin v. Laytin, 18 Wend. (N. Y.) 407.

This question is discussed at length by Judge Story; and nearly all the English and American authorities are referred to, and many of them examined. 1 Story's Eq., ch. 5, Redfield's edition. But while the weight of authority is clearly against granting relief merely on account of a mistake of the law, it seems to be conceded in nearly all the cases, and expressly decided in many of them, that there are exceptions to this rule. Hunt v. Rousmanier, 1 Pet. (U. S.) 15; Bank of U. S. v. Daniel, 12 Pet. (U. S.) 32.

Instead of saying that there are "exceptions" to the rule, it would probably be more correct to say that, while relief will never be granted merely on account of the mistake of the law, there are cases where there are other elements, not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief. It is important therefore to inquire

what it is that, with a mistake of the law, will justify the interposition of the court, where there is no fraud, or accident, or mistake of fact.

If a party, who himself knows the law, should deceive another, by misrepresenting the law to him; or, knowing him to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of fraud. So that such a case is within neither the rule nor the exception.

It has sometimes been said that, when money or other property has been obtained under a mistake of the law, which the defendant ought not in good conscience to retain, he should be compelled to restore it. Northrup v. Graves, 19 Conn. 548; Stedwell v. Anderson, 21 Conn. 139. This is just, as a principle, but entirely indefinite, as a rule. It proposes nothing but the opinion of the court in each case, on a matter in regard to which there may be great differences of opinion. It overlooks the public interests involved in maintaining the obligation of contracts. Generally, as between the parties, a mistake of law has as equitable a claim to relief, as a mistake of fact.

It is believed that in nearly all such cases, where relief has been granted, in addition to the intrinsic equity in favor of the plaintiff, two facts have been found; (1) that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms; (2) and that the party obtaining the property persuaded or induced the other to part with it, so that there has been "undue influence" on the one side, and "undue confidence" on the other. 1 Story's Eq. 120. When property has been obtained under such circumstances, and by such means, courts of equity have never hesitated to compel its restoration, though both the parties acted under a mistake of the law. And there would be still stronger reasons for granting relief in such a case, if the party from whom the property had been obtained, had been led into his mistake of the law by the other party. Sparks v. White, 7 Humph. (Tenn.) 86; Fitzgerald v. Peck, 4 Lit. (Ky.) 127.

Thus, in Pickering v. Pickering, 2 Beav. 31, Lord Langdale set aside certain agreements entered into under a mistake of the law, on the ground that "the parties were not on equal terms;" and that the plaintiff acted under the influence of the defendant. And the same thing was done in Wheeler v. Smith, 9 How. (U. S.) 55, because the parties "did not stand on equal ground;" and the plaintiff "did not act freely, and with a proper understanding of his rights." * * *

TEEL ET AL. v. DUNNIHOO ET AL.

1907. 230 Ill. 476, 82 N. E. 844.

HAND, C. J.— * * * It appears that the land in question belonged to William L. Henderson; that on August 17, 1886, he sold the same to Mary E. A. Stocks for the sum of $1,000 and executed to said Mary E. A. Stocks a deed of conveyance of said lands, intending to convey thereby said lands to said Mary E. A. Stocks in fee simple, and that in consideration of said deed of conveyance said Mary E. A. Stocks paid to said William L. Henderson the sum of $1,000; that by some mistake or error of the scrivener who wrote said deed, or from some other error or mistake at the time unknown to both the grantors and the grantee in said deed, the deed was so written as to convey said lands to said Mary E. A. Stocks and to "her bodily heirs," thereby vesting in said Mary E. A. Stocks a life estate, only, in said lands, which was not the intention of the grantors or the grantee, each of whom intended and agreed that said deed of conveyance should pass to said Mary E. A. Stocks the said lands in fee simple absolute. It further appears that Mary E. A. Stocks sold and conveyed said premises to her grantee, and he to his grantees, for a full and valuable consideration, and that her remote grantees are now in possession of said lands. In Dinwiddie v. Self, 145 Ill. 290, and Kyner v. Boll, 182 *id.* 171, this court held that it was not inequitable and unjust to correct a deed, under similar circumstances to those disclosed in this record, by striking out from a deed words of similar import to the words found in the deed from the Hendersons to Mrs. Stocks. This case, and the cases above referred to, differ materially from the case of Atherton v. Roche, 192 Ill. 252, the distinction between the cases being pointed out in the Atherton case, on page 261. Mistakes of law cannot be corrected by a court of equity. Where, however, real estate is bought for its full value, and the grantors understand they are selling and the grantees understand they are purchasing a fee title, and by mistake some words creep into the deed which defeat such intention, it clearly is not inequitable or unjust that the error should be corrected. * * *

RENARD v. CLINK.

1892. 91 Mich. 1, 51 N. W. 692.

MONTGOMERY, J.— * * * While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as

they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. Martin v. Hamlin, 18 Mich. 354; Lapp v. Lapp, 43 Mich. 287, 5 N. W. 317. But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interest, or estate, and enters into some transaction the legal scope and operation of which he correctly apprehends, and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant his relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. 2 Pom. Eq., § 849, p. 314; Reynell v. Sprye, 8 Hare 222; Blakeman v. Blakeman, 39 Conn. 320; Whelan's Appeal, 70 Pa. St. 410; Hearst v. Pujol, 44 Cal. 230; Morgan v. Dod, 3 Colo. 551; Cooper v. Phibbs, L. R. 2 H. L. 149; Lansdowne v. Lansdowne, 2 Jac. & W. 205. * * *

BAKER ET AL. v. MASSEY ET AL.

1879. 50 Iowa 399.

IN this case a conveyance by a guardian was made to include all the interest of his wards in lands whereof one-third had been assigned to the widow's dower the guardian acting under the mistaken belief that the widow owned the one-third in fee simple.

ROTHROCK, J.— * * * Counsel for appellant insist that the mistake of the parties was solely one of law; that all parties connected with the transfer of title knew all the facts, but were mistaken as to their legal effect; and that equity cannot relieve the defendants. They cite Pierson v. Armstrong, 1 Iowa 282; Shotwell v. Murray, 1 John. Ch. (N. Y.) 512; Champlain v. Laytin, 18 Wend. (N. Y.) 407; Geral v. Elley, 45 Iowa 322, and other cases, in support of the rule, and as applicable to the case at bar. Mistakes in matters of law cannot, in general, be admitted as a ground for relief in equity, but this rule is not of universal application. In Kerr on Fraud and Mistake, p. 398, it is said: "If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired."

Again, on page 399, it is said that "if an agreement be entered into between two parties, in mutual mistake as to their relative and re-

spective rights, either of them is entitled to have it set aside." The author cites numerous authorities in support of the exception to the general rule. An examination of the cases cited will show that they fully support the text. It seems to us, if we concede this to be a question of pure, unmixed, mutual mistake of law, the defendants should be relieved from its consequences, because, by the mistake, the plaintiffs are the apparent owners of that which their ancestor did not purchase nor pay for. Baker agreed to purchase the one-third of two-thirds of the land and no more. This is shown by the recital in the deed. "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill that intention or violates it, equity will correct the mistake so as to produce conformity to the instrument." 1 Story's Equity, § 115.

But it is questionable whether this mistake was one purely of law. It has this element of fact in it: The defendants were the owners of one-third, subject to the widow's dower. It was supposed they only owned one-third of two-thirds. Now, the mistake consisted in an error as to the interest owned by them. It was supposed as a matter of fact that the defendants had no title to the one-third held by the widow. True, this fact may be said to have been based upon a mistake of law as to the extent of the widow's dower, but it is nevertheless a fact, in the same sense that we state a fact proposition when we say that a certain person is the owner of a certain piece of land.

Affirmed.

HAVEN v. FOSTER.

1829. 9 Pick. (Mass.) 112.

MORTON, J.— * * * The misapprehension or ignorance of the parties to this suit, related to a statute of the State of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. 2 Stark. Ev. (Metcalf's ed.) 568; Male v. Roberts, 3 Esp. 163. If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. Kenny v. Clarkson, 1 Johns. (N. Y.) 385; Frith v. Sprague, 14 Mass. 455; Consequa v. Willings, 1 Peters's Circ. C. 229. The laws of other states in the Union are in these respects foreign laws. Raynham v. Canton, 3 Pick. (Mass.) 293.

The courts of this state are not presumed to know the laws of

other states or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this state.

That the *lex loci rei sitæ* must govern the descent of real estate, is a principle of our law, with which every one is presumed to be acquainted. But what the *lex loci* is the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seized of estate situated in the state of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus,* and does not extend to foreign laws or the statutes of other states. * * *

CHUMASERO v. GILBERT.

1860. 24 Ill. 293.

WALKER, J.— * * * When a foreign law is relied upon, either for the recovery of a right, or as a defense, the law must be pleaded and proved. This rule has been repeatedly held by this court, and is regarded as the settled law. Nor are we aware that there is any different rule when the effort is made to recover on a written contract, under the common counts; nor have we been referred to any adjudged case which announces such a doctrine. On the contrary, this and other courts have laid down the rule without any limitation, that to recover or defend under a foreign law, it must be pleaded and proved, as any other fact. And it is for the reason that courts cannot judicially know the laws which obtain in other jurisdictions, and to have effect given to them, they must be brought to the knowledge of the court by pleading and proof.

The note read in evidence in this case, specified no rate of interest, and in the absence of any specific rate, the presumption is, that the rate is the same at the place of its execution, as it is within the jurisdiction of the court. Where no rate is specified, our statute has authorized the recovery of only six per cent., and the party, to recover more, should have shown by averment in his declaration, that the laws of New York authorized a recovery of a greater rate of interest,

and should have sustained the averment by proof. In this case there was no such averment, and there was, consequently, error in permitting proof of that fact.

Judgment reversed and cause remanded.

MISREPRESENTATION.

Misrepresentation, as distinguished from fraud, is a ground for avoiding a contract when it consists in a statement or non-disclosure of the following character by one of the parties reasonably relied upon by the other and inducing him to enter into the contract.

1. An untrue statement of a material fact, though believed to be true by the one making it.

2. The non-disclosure of a material fact by one under a special obligation to make the disclosure by reason of the fiduciary nature of the contract, or the confidential relation of the parties.

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§ 58.—When a Ground for Avoiding a Contract.

FARNSWORTH v. DUFFNER.

1891. 142 U. S. 43.

BREWER, J.—This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained. In Slaughter v. Gerson, 80 U. S. 13 Wall. 379, 383, this court said: "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the

statements made, and acts upon the information thus obtained." See also Southern Development Co. v. Silva, 125 U. S. 247; Farrar v. Churchill, 135 U. S. 609. In Ludington v. Renick, 7 W. Va. 273, it was held that "a party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied." In the case of Attwood v. Small, decided by the House of Lords, and reported in 6 Clarke & F. 232, it is held that "if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations." And in 2 Pomeroy's Equity Jurisprudence, § 892, it is declared that a party is not justified in relying upon representations made to him—"1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties."

But if the neglect to make reasonable examination would preclude a party from rescinding a contract on the ground of false and fraudulent representations, *a fortiori* is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations. * * *

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§ 58 (1)—An Untrue Statement of a Material Fact.

STEVENS v. GIDDINGS.

1878. 45 Conn. 507.

THE plaintiff offered a city lot for sale at auction, stating in handbills and at the time of the sale that the depth was one hundred feet. The lot was a part of a tract pertaining to a mansion house, and the house, which was situated in part on the lot, was to go with it in the sale, and to be so changed in position as to stand wholly on the lot. The defendant bid off the lot without measuring it, and relying upon these representations. The depth was in fact but ninety-five and a half feet, and the difference materially affected its value, especially in the use of it as the site for the house. The defendant four days

after the sale informed the plaintiff that he could not accept the lot on account of the deficiency in quantity.

Action to recover the price. Judgment for defendant. Plaintiff moved for a new trial for error.

PARK, C. J.—The controlling fact in this case is, that there was a material deficiency in the quantity of land sold. The plaintiff's circular represented the lot to be one hundred feet in depth. The auctioneer proclaimed at the sale that the lot was of that depth. The lot was in fact but ninety-five and one-half feet deep. That part of the finding important in this respect is as follows: "The defendant had not measured the lot, and had no knowledge of its depth, but relied upon the statements of the auctioneer and of the circular, and he was influenced in his bid by the representations of the auctioneer. The depth of the lot was a material element in its value." The importance of the deficiency of the land sold will appear when it is considered that it was sold with a dwelling-house which was seventy-seven feet in length. The sale of the other tracts of land rendered it necessary to change the location of the house, so that the length of the house would be on a line with the depth of the lot. Hence, when the house has been placed in its new position, there will be less than ten feet space left unoccupied at each end of the house.

We think the finding of the court upon this subject is decisive of the case. The defendant was not bound to accept a lot in the circumstances of this case, which was but ninety-five and one-half feet in depth, for one of one hundred feet in depth, when the court has found that the depth of the lot was a material element in its value.

But it is said that the defendant had the opportunity to measure the depth of the lot before purchasing, and that therefore the fault was his own. It would be altogether unusual for a purchaser to measure the depth of a lot after the seller by his circular had represented it to be of a certain depth, and his agent the auctioneer had positively asserted at the time of the sale that it was of that depth. It would be far more reasonable to hold the plaintiff bound by his acts and declarations under the circumstances, than to hold the defendant bound by his omission to make the measurement. We think the defendant had the right to rely on the representations of the plaintiff and on the declarations of the auctioneer.

We do not advise a new trial.

BORDERS v. KATTLEMAN.

1892. 142 Ill. 96, 31 N. E. 19.

SHOPE, J.—This was a bill in chancery by appellee, against appellant, Borders, to set aside and rescind a sale of property on the ground of fraud practiced by appellant upon appellee, whereby the latter was induced to part with his property in exchange for a comparatively worthless note and mortgage of a third party. * * *

Where the sale is of property at a distance, so that the purchaser has not the means at hand of ascertaining the truthfulness of the vendor's representations, the vendee may rely upon their truth, and have redress if they are shown to have been materially false. (Smith v. Richards, 13 Pet. (U. S.) 26; Maggart v. Freeman, 27 Ind. 531; Harris v. McMurray, 23 *id.* 9; Ladd v. Pigott, 114 Ill. 647; Savage v. Stevens, 126 Mass. 207.) Here, as it appears, appellee did not have the ability to make any proper examination of the land without further time. Appellant, it would seem, was imperious in his demand that the transaction be closed at once, having first induced appellee to believe that he was in danger of losing his money unless he took the Crozier note and mortgage.

Nor is it important that it should be affirmatively found that the untrue representations should have in fact been known to appellant to be false. It is well settled that it is immaterial whether a party misrepresenting a material fact knows it to be false, or makes the assertion of the fact without knowing it to be true, for the affirmation of what one does not know to be true is unjustifiable, and if another act upon the faith of it, he who induced the action must suffer, and not the other. Story's Eq. Jur., § 193; 2 Pomeroy's Eq., § 877; Bigelow on the Law of Fraud, 410, *et seq.;* Cooley on Torts (2d ed.) 582; Thompson v. Lee, 31 Ala. 292; Railroad Co. v. Ting, 63 N. Y. 653; Allen v. Hart, 72 Ill. 104; Fauntleroy v. Wilcox, 80 *id.* 477; Hicks v. Stevens, 121 *id.* 186. So it has been held, that where the representations relate to facts which must be supposed to be within the defendant's knowledge, proof of their falsity is a sufficient showing of his knowledge that they were false. (Cooley on Torts, 583; 109 Mass. 593; 62 N. Y. 319.) And so, a party selling property is presumed to know whether the representations he affirmatively makes in respect to it are true or false. If he knows them to be false it is a positive fraud, and if he makes them without knowing them to be true, for the purpose of inducing another to act upon them, it in equity amounts to fraud. Miner v. Midberry, 6 Wis. 295; Smith v. Richards, *supra;* McFarran v. Taylor, 3 Cranch (U. S.) 370; Glasscock v. Minor, 11 Mo. 655.

Taking the evidence on the part of appellee, supported by the letters of appellant and proof of extrinsic facts, we are unable to say

that the chancellor was not justified in finding that appellee was induced to part with his certificate of deposit by the statements and representations of appellant of matters materially affecting the transaction, and which are shown to be untrue. * * *

HART ET AL. v. MOULTON.

1899. 104 Wis. 349, 80 N. W. 599.

MARSHALL, J.— * * * The idea that a sale induced by false representations is not voidable in the absence of an intent on the part of the purchaser not to pay, comes from confusing statements made in judicial opinions to the effect that a mere failure by the vendee to disclose his insolvency, unaccompanied by any false pretenses or artifice, is not sufficient to warrant a rescission of the sale,—that there must be in addition an intent not to pay, with the substantive wrong of obtaining goods by false pretenses. In many of the cases found in the books, where there were no false representations and the ground upon which the recovery was sought was intent not to pay, language is used to the effect that mere insolvency and failure to disclose it is not sufficient of itself to establish the essential element of intent not to pay,—that there must be, in addition, false representations of some kind, or some artifice resorted to in order to obtain possession of the goods. There is no question anywhere in the books but that a sale induced by false pretenses alone is voidable, or but that a purchase with preconceived intent not to pay is also voidable; but the circumstances, from which the intent mentioned may be inferred, are the subject of much discussion, in which, as before indicated, it will be found stated, over and over again, that false representations of some kind are necessary if the only other evidentiary fact is insolvency of the buyer. Such statements of the law led counsel for the respondent, evidently, and the trial court as well, to the erroneous conclusion that a formed intent not to pay, and false pretenses as well, are essential elements to a complete wrong warranting a rescission of a sale. Mere evidentiary circumstances, so treated in the law, the trial court held were essential elements of an actionable wrong.

Our own decisions are replete with precedents where false representations of material facts, made to induce a sale, relied upon by the seller, were held sufficient to render the sale voidable at the election of the seller, and that, whether the purchaser knew or did not know the representations made by him were false, it being held sufficient if he either knew or ought to have known the truth of his statements before making them. McKinnon v. Vollmar, 75

Wis. 82, 43 N. W. 800; Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Porter v. Beattie, 88 Wis. 22, 59 N. W. 499; Gunther v. Ulrich, 82 Wis. 222, 52 N. W. 88; Beetle v. Anderson, 98 Wis. 5, 73 N. W. 560; Clothing Co. v. Hulbert, 98 Wis. 183, 73 N. W. 784; Clothing Co. v. Thorp, *supra*. That it is in accordance with the doctrine found laid down in the standard text-books. Benj. Sales, § 451. The only distinction recognized anywhere, between a sale induced by fraudulent representations and a purchase with intent not to pay, as substantive, independent, actionable wrongs, is that in the former the transaction is deemed to be voidable and in the latter absolutely void. That distinction is made in some jurisdictions, but, as said by the text writers, it is of no practical importance.

Authorities may be cited without substantial conflict, and much beyond the limits that can be devoted it in this opinion, in support of the doctrine stated. Many of such authorities are found in the brief of appellants. Hogden v. Hubbard, 18 Vt. 504; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802; Reid v. Cowduroy, 79 Iowa 169, 44 N. W. 351; Newell v. Randall, 32 Minn. 171, 19 N. W. 972; Stephenson v. Weathersby, 65 Ark. 631, 45 S. W. 987; Bugg v. Shoe Co., 64 Ark. 12, 40 S. W. 134; Burnham v. Ellmore, 66 Mo. App. 617; Same v. Jacobs, *id.* 628; McKenzie v. Wiennman, 116 Ala. 194, 22 So. 508; Jandt v. Potthast, 102 Iowa 223, 71 N. W. 216; Mauger v. Slavin, 42 N. Y. S. 331, 11 App. Div. (N. Y.) 483; Rubber Co. v. Loewenberg, 17 Wash. 29, 48 Pac. 785; Stevenson v. Marble (C. C.), 84 Fed. 23; Huthmacher v. Lowman, 66 Ill. App. 448.

In Bugg v. Shoe Co., *supra*, cited by appellants' counsel and before referred to, the precise proposition here contended for by respondent's counsel was urged upon the attention of the court and was repudiated as contrary to the settled law, many authorities being cited on the subject, including Judd v. Webber, 55 Conn. 267, 11 Atl. 40, where it was said that "when goods are obtained by false representations as to the financial standing of the purchaser, an intent of the buyer to pay may lessen the moral turpitude of the act, but it does not suffice to antidote and neutralize the intentional false statement which has accomplished its object of benefiting the purchaser and misleading the seller to his injury."

From the foregoing the following principles may be stated as established: If a person misrepresent to another material facts, knowing, or under such circumstances that he ought to know, the truth, for the purpose of inducing such other to sell property to him, and such other, without negligence, relying upon such representations, make the sale, he can, upon discovering the truth, rescind the transaction and recover back his property, saving the rights of *bona fide* purchasers or incumbrancers thereof in the meantime. To obtain property by false representations in the manner indicated, constitutes a substantive, actionable wrong, without regard to whether

the vendee does or does not intend to pay for the subject of the purchase. If a person purchases property of another with intent not to pay for the same, the vendee may rescind the sale and recover back the subject thereof, as in case of the circumstances first stated. False representations to obtain the property are not a necessary element to make a complete cause of action under the circumstances covered by the second proposition, nor is intent not to pay essential to a complete cause of action under the circumstances covered by the first proposition. The former is complete by the concurrence of false representations of material facts, regarding which the falsifier knows or ought to know the truth, for the purpose of inducing a sale of property to him, and the consummated contract of sale, the seller relying upon such false representations. In such circumstances the law will not permit the wrongdoer to profit by his fraud if the wronged party otherwise elect, saving the rights of innocent third persons. The latter is complete by the purchase of property, the transaction being characterized by a secret, definitely formed intent on the part of the purchaser never to pay for the subject of the purchase. While false representations to obtain possession of the property, and insolvency of the purchaser, are evidence bearing on the existence of the fraudulent intent, neither of such elements is essential to a caue of action to recover back the property. They are evidentiary facts tending to show the fraudulent purpose not to pay. That is all. The two circumstances together, or that of false representations made to obtain possession of the property alone, may warrant a finding of the fraudulent intent mentioned, but the mere fact of undisclosed insolvency, of itself, is not sufficient. Clothing Co. v. Thorp, 102 Wis. 70, 78 N. W. 184. Such stated principles are fatal to the judgment appealed from. The trial court was clearly wrong as to the law applicable to the evidence in the case. * * *

LOEWER v. HARRIS.

1893. 57 Fed. 368.

WALLACE, J.— * * * The action was brought for damages arising from an alleged false representation made by the defendant to the plaintiff respecting the output and profits of the Gambrinus Brewing Company. * * * There is no merit in the assignment of error based upon the rulings of the court in admitting evidence of a decrease of output and profits intermediate the time of the representation and the signing of the contract, or the rulings as to the effect of that evidence, and the duty of the defendant to inform the plaintiff of the facts. It is an elementary proposition in the law of fraud that,

if one party to a contract knowingly assists in inducing the other to enter into it by leading him to believe that which he himself knows to be false, his conduct is fraudulent, and it matters not whether the result is brought about by misrepresentation or by keeping silent when duty requires a disclosure. As was said in French v. Vining, 102 Mass. 135: "Deceit may sometimes take a negative form, and there may be circumstances in which silence would have all the legal characteristics of actual misrepresentation."

The law requires disclosure to be made only when there is a duty to make it, and this duty is not raised by the mere circumstance that the undisclosed fact is material and is known to the one party and not to the other, or by the additional circumstance that the party to whom it is known knows that the other party is actually in ignorance of it; but when one of the parties, pending negotiations for a contract, has held out to the other the existence of a certain state of facts, material to the subject of the contract, and knows that the other is acting upon the inducement of their existence, and, while they are pending, knows that a change has occurred, of which the other party is ignorant, good faith and common honesty require him to correct the misapprehension which he has created. It becomes his duty to make disclosure of the changed state of facts, because he has put the other party off his guard. The doctrine is thus stated by Mr. Pollock, in his work on Principles of Contracts (page 491):

"It is sufficient if it appear that the one party knowingly assisted in inducing the other to enter into the contract by leading him to believe that which was known to be false. Thus it is where one party has made an innocent misrepresentation, but, on discovering the error, does nothing to undeceive the other."

The representation made by defendant respecting the output and profits of the business, if made at all, was made in response to an inquiry of the plaintiff, coupled with the statement that he would not want to have anything to do with the transaction if the profits were not as good as they had been, and that the capitalization of the corporation would be based on the earning capacity of the business. The defendant understood that the inquiry and answer were addressed to the condition of things which might be relied upon by the plaintiff as the basis of the contract which was thereafter to be formally concluded. As it turned out, a period of several months elapsed before the contract was executed, during which the plaintiff was absent from the country, and had no means of informing himself of the real state of affairs. Under such circumstances, it cannot be doubted that, when the defendant discovered that the conditions of the business were not as he had led the plaintiff to suppose them to be, it was his duty to inform him of the facts, and, by maintaining silence when he should have spoken, he was guilty of deceit. * * *

§ 58 (2)—Non-Disclosure of a Material Fact.

THE LYCOMING FIRE INSURANCE COMPANY v. RUBIN.

1875. 79 Ill. 402.

BREESE, J.—* * * The contract of insurance is one in which the parties to it must act in the utmost good faith. No false representations must be made, which go to affect the risk. The insured must tell the whole truth—there must be no concealment of any important fact, or false representations as to amount of stock or value. The insurer trusts to the representations of insured, and proceeds upon the confidence that he has been given all the *data* necessary to enable him properly to estimate the risk. * * *

KEITH, SNELL AND TAYLOR v. GLOBE INS. CO.

1869. 52 Ill. 518.

PER CURIAM.—A petition for a rehearing has been presented in this cause, which we have attentively considered, but are unable to perceive any reason for changing the conclusions at which we arrived when we rendered the decree of reversal then announced. But inasmuch as we omitted to discuss one or two points urged in the argument previously filed by appellees, we deem it proper now to consider them.

It is urged that appellants failed to disclose facts that added greatly to the hazard of the risk, and which, if disclosed to appellees, would have prevented them from taking the risk, or would have added to the premium. It is first said, Taylor was obnoxious to the people in the vicinity of the place where the cotton was stored, and that fact should have been disclosed to the company when the application was made. It is a general rule, that all material facts, which directly tend to increase the hazard, must be disclosed by the applicant. While this is true, the rule must have a practical application. It cannot be said that because the assured was at variance with a few persons, he is bound to disclose the fact to the agent of the company, to render his policy binding. Nor is he required to inquire whether he is popular or unpopular, that he may disclose the fact to the company. No case has, we presume, gone that length. If, however, the assured be interrogated when he makes the application, then he must give true answers on all matters connected with the hazard of the policy.

In this case, we must presume that the agents of appellees were as fully apprised of the unsettled condition of the country in the vicinity of West Point, Mississippi, as were the applicants. As intelligent men, they must have been fully aware of the fact, that northern men, at that time, (Dec. 1865), were obnoxious to the people of that locality. That was a matter they must have known as well as appellants.

It is likewise urged, that the disclosures were not full as to the situation of the cotton, or the manner it was guarded. Keith, so far as is disclosed by the evidence, did give a full statement of the place where it was stored, and its exposure to fire from passing engines. It is true, he did not inform the insurance agents that the guards smoked pipes, and had fire in the immediate vicinity for the purpose of warming themselves. But at the season of the year at which this transaction occurred, it being in the winter, all persons know that fire would be necessary to the guard, and that it must be kept within, or near to the building, to be of use to the guard. And no questions were asked in reference to the fire, nor as to whether any of the guard smoked. The probabilities are, that it did not occur to either of them that the cotton might be thus exposed, and it is not probable that Keith could have answered, had the questions been propounded to him by the agents. We can see no evidence of fraud or bad faith in failing, unasked, to disclose the facts of which complaint is now made.

It is urged that inasmuch as the cotton was seized under the order of a government officer, appellants cannot recover. None of the grounds of the seizure appear in the record, unless we might infer that it was procured to be done by a person whose cotton had been seized, on information furnished by Taylor, as a matter of retaliation. We are entirely uninformed whether the seizure was warranted by the facts, and we are not at liberty to infer, in the absence of proof, that there were legal grounds for the action of the officer. The seizure did not, and could not, of itself, divest appellants of their title to the cotton. There was, so far as we are advised, no trial or condemnation, nor is there any proof that appellants had done any act authorizing a seizure. We are therefore constrained to hold that the mere seizure, unaccompanied with the evidence of its condemnation, or proof of an act of forfeiture, could not divest appellants' title or bar a recovery. If it has been held that a seizure by government produced such a result, it could only be where it appeared that the owner had done some act which forfeited the property, which had been followed by a seizure by the government. Beyond that, we could not assent to go, in the application of the rule. In this case the evidence does not show that fact.

That the property was seized, and was subsequently guarded by government troops, was one of the perils incident to the military occupation of the country where the cotton was stored. The condi-

tion of the country must have been known and considered in fixing the premium, which was at the highest rate they charged. Nor does it appear that there was more hazard to the cotton from the military guard, than would have been incurred by a guard of citizens. That the military authorities would be as careful as citizens, we may reasonably suppose. The guard were under military discipline and were accountable to that authority, and it may be inferred that they would feel as much or more responsibility for their conduct than would citizens of the place with whom appellees contend Taylor was unpopular. From a careful examination of the entire record, and mature consideration of appellees' argument previously filed, together with their petition for a rehearing, we are unable to perceive that the decree heretofore rendered is in any respect erroneous.

Rehearing denied.

WYTHEVILLE INS. CO. v. STULTZ.

1891. 87 Va. 629, 13 S. E. 77.

LACY, J.— * * * As to the duty of the insured to make every disclosure which is material to the risk, whether questioned concerning the same or not. It is generally true that the insured is bound only to disclose such matters as may be inquired about, and not the particulars of his title, unless the same is inquired about, or unless it is made imperative upon him by some condition of the policy. The rights of the insurer are sufficiently guarded by having it in his power to exact by inquiry, a description of the interest of the insured, and by the recovery being limited, in case of loss, to the value of the interest proved at the trial. As was said by Judge Moncure in Insurance Co. v. Sheets, 26 Grat. (Va.) 872, quoting from Morrison v. Insurance Co., 18 Mo. 262: "The man who asks insurance on his property is not aware of the necessity of disclosures which long experience in insurance offices has shown to the underwriter to be necessary, and to hold his policy void, for not making disclosures of the importance of which he is not aware, would be gross injustice." And again: "What is material must be determined from the circumstances of each case. What is material in one case may not be in another, and so a wide field for litigation will be opened. The ends of justice will be best subserved by holding the assured only responsible for fraud. Insurance companies may protect themselves by inquiries in relation to these things, and after filling their policies with so much detail, and so much *minutiæ* of information in regard to other matters, as to create the impression that they are satisfied, to hold that they are not bound by their contract, unless information of another kind is communicated by the

assured, which is not sought for, would be enabling them to commit the rankest injustice." And Judge Moncure adds: "These views are very strong and I am decidedly of opinion that they are correct. Nothing more need be added to them." In Clark v. Insurance Co., 8 How. (U. S.) 235, it is said the relation of the parties is entirely changed, if the insurer asks no information, and the insured makes no representations. But when representations are not asked nor given, and with only this general knowledge the insurer chooses to assume the risk, he must be presumed, in point of law, to do so at his peril. In this case the policy was issued on a mere request to insure, and without any statement as to these things now contended for." * * *

PHŒNIX MUTUAL LIFE INS. CO. v. RADDIN.

1887. 120 U. S. 183.

THIS was an action to recover on a life insurance policy. The application contained several printed questions among which was No. 28 and an answer as follows:

"28. Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy?

$10,000. Equitable Life Assurance Society.

In the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance."

GRAY, J.— * * * Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. Moulor v. American Ins. Co., 111 U. S. 335; Campbell v. New England M. L. Ins. Co., 98 Mass. 381; Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are mate-

rial facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. Carpenter v. Providence Washington Ins. Co., 41 U. S. 16 Pet. 495; Jeffries v. Life Ins. Co., 89 U. S. 22 Wall. 47; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Law Union Ins. Co., L. R. 9 Q. B. 328; Edington v. Ætna Life Ins. Co., 77 N. Y. 564; and 100 N. Y. 536.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. Cazenove v. British Equitable Assur. Co., 29 Law Jour. N. S. C. P. 160, affirming s. c. 6 C. B. N. S. 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. Connecticut M. L. Ins. Co. v. Luchs, 108 U. S. 498; Hall v. People's M. F. Ins. Co., 6 Gray (Mass.) 185; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176; American Ins. Co. v. Mahone, 56 Miss. 180; Carson v. Jersey City Ins. Co., 14 Vroom (N. J. L.) 300; 15 Vroom (N. J. L.) 210; Lebanon M. Ins. Co. v. Kepler, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. Towne v. Fitchburg Ins. Co., 7 Allen (Mass.) 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. Nichols v. Fayette M. F. Ins. Co., 1 Allen (Mass.) 63.

In the contract before us, the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued," and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The 28th printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party?

If so, with what result? What amounts are not assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "$10,000, Equitable Life Assurance Society."

The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space and its position with regard to that space and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one subject; the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the 28th question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to diclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional. * * *

BANKERS' LIFE INS. CO. v. MILLER.

1904. 100 Md. 1, 59 Atl. 116.

SCHMUCKER, J.— * * * The cardinal question raised by the action of the court on the prayers is whether it was proper to require the jury, in addition to finding the fact of the representations alleged to have been made by Mrs. Miller, and their materiality to the risk, to go further, and find that the representations were known to her to be untrue and fraudulent when she made them, in order to find a verdict for the defendant. * * * The better authorities agree that a material misrepresentation made by an applicant for life insurance, in reliance on which a policy is issued to him, avoids the

policy, whether it be made intentionally, or through mistake and in good faith. This doctrine rests upon the fact that, even if the untrue material representation be innocently made, it deceives the insurer, who relies upon it, and thus the risk which he actually assumes is different from the one which the action of the applicant in making the representation led him to suppose he was assuming. May on Insurance, § 181; Bliss on Life Insurance, §§ 48, 49; Phillips on Insurance, § 537; Carter v. Boehm, 3 Burrows 1900; Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381; Am. & Eng. Ency. of Law, vol. 16 (2d ed.), p. 933.

The uncontradicted evidence in this case to which we have referred establishes the fact that Mrs. Miller, when she was an applicant for the policy sued on, made untrue representations to the defendant in reference to the state of her health, which were not only material, but were vital, to the risk, and that the policy was issued to her in reliance upon those representations. It is difficult to understand how she could have made some of those representations in ignorance of their untruth. But be that as it may, it is irrational to suppose that the appellant would have issued the policy if it had been apprised of the true state of the facts to which the representations related. The same effect was produced on the appellant as if the representations had been fraudulent, for it was induced by them to enter into a risk which it would have rejected if it had been properly informed, and it ought not to be held to a risk which it assumed in that manner.

The judgment appealed from will be reversed because of the erroneous action of the court below upon the prayers, and, in view of the uncontradicted evidence as to the fact of the untrue representations made by the applicant for the insurance, and the evident materiality of the subject to which they relate, we think that no recovery ought to be had upon the policy sued on, and we will not send the case back for a new trial. Judgment reversed, with costs, without a new trial.

GLOBE LIFE INS. ASS'N v. WAGNER.

1900. 188 Ill. 133, 58 N. E. 970.

WILKIN, J.—The chief ground urged by appellant for reversal of the judgment of the appellate court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and answer appear: "Q.—How many brothers dead? Ans.—None." The medical examination is certified to by the medical examiner, as follows:

"I certify that I have, this 7th day of October, 1895, made a personal examination of the above-named person (Richard Wagner), and that the above answers are in my own handwriting, and that the signature of the applicant or person examined was written in my presence. M. J. McKENNA, M. D."

Preceding the medical examiner's certificate, and immediately at the end of the series of questions and answers referred to in the certificate, of which the quoted question is one, appears the following language, to which is affixed the signature of Richard Wagner, the insured: "I hereby declare and warrant that the answers to the above questions, and the statements made in the application on the other side thereof, are true, and were written by me or by my proper agent, and that said answers and statements, together with this warranty, shall form the basis of any contract of insurance that may be entered into between me and the Globe Mutual Insurance Association, and that if a contract of insurance is issued it shall not be binding on the company unless, upon its date and delivery, I shall be in sound health." On the front side of the sheet, on the back of which is the medical examination and statement signed, as above, by the insured, is the application by appellee for the policy, and over her signature appears the following: "I hereby make application for the policy described above, and as an inducement to the association to issue a policy, and as a consideration therefore, make the agreement as to agency, and all other agreements and warranties contained in the medical examination, as fully as if I had signed the same."

It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant asserts, however, that, whether he knew of it or not, the statement that none of his brothers were dead is a warranty, and being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not. (Moulor v. American Life Ins. Co., 111 U. S. 335.) Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. To hold that, as a precedent to any binding contract, he should guarantee absolutely that none of his brothers were dead would be unreasonable, in the absence of a more explicit stipulation than here appears. It not infrequently happens that a man loses trace of all or a part

of his relations, and to hold him to absolutely guarantee that they were living, in order that he might obtain insurance, would sometimes be to require an impossibility, and would be almost absurd.

What is said in Moulor v. American Life Ins. Co., *supra,* is peculiarly applicable to the case at bar. In that case the insured made a false statement as to his having had certain diseases, and "warranted that the above are fair and true answers." The court say: "The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but in another and broader sense, the word 'true' is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses in the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted —that what the company required of the applicant as a condition precedent to any binding contract was, that he would observe the utmost good faith towards it, and make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and in the absence of proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answer proved to be false.

We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed.

Judgment affirmed.

BROOKS v. MARTIN.

1864. 2 Wall. (U. S.) 70.

MILLER, J.—This is an appeal from the district court of the United States with circuit court powers, for the district of Wisconsin.

The appellee filed his bill in chancery in that court to set aside a contract by which he had sold to the appellant his interest in a partnership venture, and for an account of the partnership funds in his hands.

The court granted the relief prayed for in the bill, and Brooks, the defendant there, has brought the case here by appeal. * * *

The purchases and sales were to be conducted by Brooks and Field, and the money furnished by Martin. * * *

Brooks and Field thus managed the entire concern, at a distance of nearly two thousand miles from Martin and, as we think the testimony shows, without consulting him in any way, and with very little regard for his large interest in the business.

Under these circumstances, Brooks must be held to have been not only the partner, but the special agent of Martin; and the purchase made by him of Martin's interest must be tested by the rules which govern such transaction as between principal and agent.

What are these rules? "On the whole, the doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." 1 Story Eq., § 323. Or, to speak more specifically, "if a partner who exclusively superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void." Sec. 220.

In Coles v. Trecothick, 9 Ves. 234, speaking of a purchase by a trustee from his *cestui que trust,* Lord Chancellor Eldon says, that though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence; so much, that it is very hazardous for a trustee to engage in such a transaction. "A trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; provided the *cestui que trust* intended the trustee should buy and there is no fraud, no concealment, no advantage taken, by the trustee, of information acquired by him in the character of trustee. "I admit," he says, "it is a difficult case to make out, wherever it is contended, that the exception prevails." This has long been regarded as a leading case, and the above remarks have been often cited by other courts with approbation. We think them fully applicable to a purchase, by an agent from his principal, of the property committed to his agency.

See also, Michoud v. Girod, 4 How. (U. S.) 503; Bailey v. Teakle, 2 Brockenbrough, 51-54; Hunter v. Atkyns, 3 Mylne & K. 113; Maddeford v. Austwick, 1 Simmons 89.

We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound

judgment of the value of what he sold, should have been communicated by the former to the latter. * * *

Decree of the district court affirmed.

TYLER v. SANBORN.

188. 128 Ill. 136, 21 N. E. 193.

SCHOLFIELD, J.— * * * The doctrine is familiar, and has been often recognized by this court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. (Coat v. Coat, 63 Ill. 74; Ebelmesser v. Ebelmesser, 99 *id.* 548; Zeigler v. Hughes, 55 *id.* 288; Hughes v. Washington, 72 *id.* 85.) It is of no consequence, in such case, that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction by the agent. Kerr on Fraud and Mistake (Bump's ed.) 173, 174; Perry on Trusts, § 206; Story's Eq., § 315; Bispham's Eq. (2d ed.), p. 299, § 238. The rule is not merely remedial of wrong actually committed, —it is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the chief justice in Staats v. Bergen, 2 C. E. Green (N. J. Eq.) 554, that "a trustee may not put himself in a position, in which, to be honest must be a strain on him." An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal; but in such case the burden is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying or interested, but also of every material fact known to the agent which might affect the principal, and that, having such knowledge, he freely consented to the transaction. Porter v. Woodruff, 36 N. J. Eq. 174; Dunne v. English (L. R. 18 Eq. Cases 524), 10 Eng. (Moake's notes) 837. See also, notes to Fox v. Macreth, Pitt v. Mackreth, 1 L. C. in Eq. (Hare & Wall. notes), 3d Am. ed., pp. 209, 210, *et seq.; id.*, p. 220. * * *

WILLIN v. BURDETTE.

1898. 172 Ill. 117, 49 N. E. 1000.

CRAIG, J.— * * * The relation of attorney and client existing between the parties when the deed was made, the next inquiry is, whether, under the facts as they appear in the record, the deed can be sustained. The appellant, being a client when the deed was made,

was not required to establish fraud or imposition in order to defeat the instrument. The relation having been shown when the deed was executed, the burden of proof rests upon the attorney to show fairness, adequacy and equity, and upon failure to make proof, a court of equity will treat the case as one of constructive fraud. (Jennings v. McConnel, 17 Ill. 148.) This rule was followed in Morrison v. Smith, 130 Ill. 304, and Ross v. Payson, 100 *id.* 349. In the Morrison case, Weeks on Attorneys and Counselors is quoted with approval, as follows (p. 316): "The attorney who bargains in a matter of advantage to himself with his client is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client, without misrepresentation or concealment of any fact material to the client; that the client was fully informed of his rights and interests in the subject-matter of the transaction and the nature and effect of the contract, sale or gift, and was so placed as to be able to deal with his attorney at arm's length." * * *

FRAUD.

Fraud, considered as a ground for avoiding a contract, consists in any of the following acts, committed by one of the parties or with his connivance, with intent to induce the other to enter into the contract, reasonably relied upon by the latter, and actually inducing him to enter into the contract.

1. A false representation of a material fact by one with knowledge of the falsehood or in reckless disregard of what may be the truth.

2. The active concealment of a material fact by one with knowledge or belief of the fact.

3. Any other act or conduct fitted to deceive.

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§ 59.—When a Ground for Avoiding a Contract.

MILLER v. JOHN.

1904. 208 Ill. 173, 70 N. E. 27.

WILKIN, J. * * * The rule is, that in order to render one responsible for a false representation it is not necessary that he should have made the representation himself. If a person authorizes or causes a representation to be made, he is as fully responsible as if he made it himself, and if two or more persons act in concert or conspire to commit a fraud upon another, each is responsible for the false and fraudulent representations of the others within the scope of the conspiracy. (14 Am. & Eng. Ency. of Law (2d ed.) 155, and authorities in note 6.) * * *

HUMPHREY v. MERRIAM.

1884. 32 Minn. 197, 20 N. W. 138.

MITCHELL, J.—This was an action for damages for deceit in the sale of stock of the Florence Mining Company. The deceit consisted, as alleged by plaintiff, in the false and fraudulent statements of one Carver, defendant's agent, who made the sale, as to the value, condition, and productiveness of the company's mine, and as to the amount of its indebtedness. Assuming that the alleged representations were made, and that they were untrue (of which facts there was competent evidence), and that they were material (which some of them undoubtedly were), it was incumbent on plaintiff in such an action also to prove (1) that they were fraudulently made; and (2) that he believed them, and relied on them in making the purchase. Deceit is the type of fraud, and an intention to deceive is a necessary element or ingredient. False representations do not amount to a fraud at law in such case unless they be made with a fraudulent intent. Of course, to constitute a fraudulent intent, it is not necessary that the party knew them to be false. The intent to deceive may be shown in either of three ways: (1) That the party knew his statements to be false; or (2) that, having no knowledge of their truth or falsity, he did not believe them to be true; or (3) that, having no knowledge of them, he yet represented them to be true of his own knowledge. In the first case there would be a knowingly false assertion as to the facts; in the second, as to his belief; and in the third, as to his knowledge of the fact; and in each case the intent to deceive would be a necessary inference. But in each case the *intent to deceive* must exist, and must be proven. If this intention is absent there is no fraud. Hence, if Carver honestly stated what he believed to be the facts, and did not mistake the source or extent of his information, the defendant is not liable in this action. Kerr, Fraud & M. 54, 55, *et seq.*; Pasley v. Freeman, 2 Smith Lead. Cas. (7th Amer. Ed.) 92, and notes; Chandelor v. Lopus, 1 Smith Lead. Cas., pt. 1, p. 299, and notes; Haycraft v. Creasy, 2 East 92; Stone v. Denny, 4 Metc. (Mass.) 151; Marsh v. Falker, 40 N. Y. 562; Chester v. Comstock, *id.* 575; Meyer v. Amidon, 45 N. Y. 169; Oberlander v. Spiess, *id.* 175.

The evidence in this case is so voluminous that it is impossible to state it in full, and the different parts of it are so connected that a statement of a portion would give an imperfect and inaccurate idea of the case. But, after reading the whole carefully, we are of opinion that it wholly fails to show that Carver's representations were fraudulently made; that is, made with intent to deceive. We find nothing tending to show that he knew them to be false, or that he did not honestly believe them to be true, or that he misstated the extent or sources of his information. On plaintiff's own showing it

is clear that Carver had never been to the mine, and hence had no personal knowledge of its character and condition, but made his statements upon reports received and information derived from others, and that plaintiff knew that fact. * * *

HUNNEWELL v. DUXBURY ET AL.

1891. 154 Mass. 286, 28 N. E. 267.

BARKER, J.—The action is tort for deceit in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to $150,000, had been paid in, and that patents for electrical advertising devices of the value of $149,650 had been transferred to it. From the exceptions it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate dated August 11, 1885, required by St. 1884, c. 330, § 3, signed by the defendants, with a jurat stating that on that date they had severally made oath that the certificate was true to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records, and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations. The main question is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under St. 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit. To sustain such an action misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains. This certificate was not communicated by the defendants or the corporation to the public or the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the state. The terms of the statute carry no implication of such a liability. * * *

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In Fogg v. Pew, 10 Gray (Mass.) 409, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In Bradley v. Poole, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff in the course of the negotiation for the shares the price of which the plaintiff sought to recover. Felker v. Yarn Co., 148 Mass. 226, 19 N. E. 220, was an action under Pub. St., c. 106, § 60, to enforce a liability explicitly declared by the statute. Nor is there any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: (1) Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. (2) Those persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. Bagshow v. Seymour, 4 C. B. (N. S.) 873; Watson v. Earl of Charlemont, 12 Adol. & E. (N. S.) 856; Bedford v. Bagshow, 4 Hurl. & N. 537; Clarke v. Dickson, 6 C. B. (N. S.) 453; Jarrett v. Kennedy, 6 C. B. 319; Campbell v. Fleming, 1 Adol. & E. 40; Peek v. Derry, 37 Ch. Div. 541, and L. R. 14 App. Cas. 337; Angus v. Clifford, 2 L. R. Ch. 449. In these cases the representations were clearly addressed to the plaintiffs, among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. Morgan v. Skiddy, 62 N. Y. 319; Terwilliger v. Telegraph Co., 59 Ill. 249; Paddock v. Fletcher, 42 Vt. 389. The numerous cases cited in the note to Pasley v. Freeman, 2 Smith Lead. Cas. (9th Amer. ed.), p. 1320, are of the same character. In the case at bar the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the state a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents, and be induced by them to take the notes. It is not such a representation made by one to another with intent to deceive as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and

cannot fairly be inferred or found to have been made with the intent to deceive him. * * *

EATON, COLE & BURNHAM CO. v. AVERY.

1880. 83 N. Y. 31.

RAPALLO, J.— This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. Cazeaux v. Mali, 25 Barb. (N. Y.) 578; Newbery v. Garland, 31 *id.* 121; Bruff v. Mali, 36 N. Y. 200; Morgan v. Skiddy, 62 *id.* 319; Commonwealth v. Call, 21 Pick. (Mass.) 515, 523; 32 Am. Dec. 284; Commonwealth v. Harley, 7 Metc. (Mass.) 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the

courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit, may by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A. casually or from vanity makes a false or exaggerated statement of his pecuniary means to B., or even if he does so with intent to deceive and defraud B., and B. communicates the statement to C., who acts upon it, A. cannot be held as for a false representation to C. But if A. makes the statement to B. for the purpose of being communicated to C., or intending that it shall reach and influence him, he can be so held. In Commonwealth v. Call, 21 Pick. (Mass.) 515, 32 Am. Dec. 284, the court say on this point at page 523, that the representation was intended to reach P. and operate upon his mind; that it did reach him, and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In Commonwealth v. Harley, 7 Met. (Mass.) 462, the prisoner was indicted for obtaining goods by false pretenses from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co., who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A. make a false statement of his affairs to B. and then publicly hold out B. as his reference, can it be doubted that he would be bound by the communication of his statement by B. to any person who might inquire of him in consequence of this

reference? That case differs from the present one only in the fact that here was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm.

The case is a new one in its facts, but the principles by which it should be governed are well established. * * *

JUDD ET AL. v. WEBER.

1887. 55 Conn. 267, 11 Atl. 40.

LOOMIS, J.—The complaint in this case alleges, in substance, that the defendant, in order to obtain on credit from time to time large quantities of wool of the plaintiffs, for the firm of Smith & Weber, of which he was at the time a member, stated to the plaintiffs that the firm had a capital of $50,000, solely at the risk of the business; that the defendant individually was worth from $25,000 to $30,000, and had contributed in cash from his own money, not borrowed, $25,000 towards the capital of the firm; and that all these statements were false, and known to be so by the defendant when he made them, and that the plaintiffs, believing the statements true, sold and delivered the goods asked for on credit, and thereby suffered loss to the amount of $2,760. The court finds that the defendant did make the false statements as charged, that he knew them to be false, that he made them for the purpose of inducing the plaintiffs to sell to the defendant's firm on credit, and that he knew the plaintiffs would not have given the credit except for their belief that the representations were true, and that the plaintiffs, believing the statements true, and relying upon them, did sell, on credit, wool to the defendant's firm as claimed by them, and that the plaintiffs suffered damage by reason of the premises to the amount of $2,760. The court rendered judgment for the plaintiffs for this amount, and the defendant appealed.

The reasons for appeal, as stated on the record, are quite numerous, but they may all be disposed of by the answers we may give to

the following questions: Does the finding of the court show that the defendant was guilty of actual fraud? and if so, did the plaintiffs suffer any injury in consequence, and did the court err in admitting evidence? The finding, as we have stated its substance above, gives a most emphatic answer to the first question, in the affirmative. But the defendant's counsel base their claim that there was no actual fraud upon an additional clause in the finding, which is as follows: "It does not appear that in contracting the debt in question the defendant had any definitely formed plan or settled design to defraud the plaintiffs, or to defraud anybody. He had had no especial business training. He was not an accountant. He was wholly ignorant of the trade in wool. He had never had any experience in running or managing a factory, and knew nothing of the woolen manufacture. He had an exaggerated idea of the profits that could be made in that business, and had a very much greater confidence in himself as a business man than the subsequent events would seem to justify. He was hopeful and trusting, and was actuated by that easy credulousness which comes from inexperience. He hoped and expected to pay all the debts that should be incurred from the profits which he hoped and expected to make. The facts, however, disclosed at the trial, show that there was never any reasonable ground for such expectation. Any person of reasonable prudence, and with a reasonable knowledge of business, who knew all the facts exactly as the defendant knew them, would have foreseen that failure was inevitable, and that somebody would have to be cheated." This may have lessened the moral turpitude of his act, but it will not suffice to antidote and neutralize an intentionally false statement, which had already accomplished its object of benefiting himself, and of misleading the plaintiffs, to their injury. Actual or positive fraud consists in deception, intentionally practiced to induce another to part with property, or to surrender some legal right, and which accomplishes the end designed.

All that this additional finding shows is that the defendant's fraud did not consist in a preconceived design not to pay for the wool, but the fraud was directed to the obtaining of the plaintiffs' wool on credit, by statements known to be false, which he knew could not be obtained if he told the truth, and the fraud was complete when the end was accomplished and damage resulted. It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent if one, with a view of benefiting himself, by intentional falsehood, misleads another in a course of action which may be injurious to him. The ulterior hopes and expectations of the defendant, so much relied upon, were utterly immaterial. It is true that the motive to pay at some future time was innocent, but the motive to obtain present possession and title to another's property, by the use of falsehood, and false pretenses, throw-

ing all the risk of loss on another, was corrupt. As well might the embezzler of another's funds plead his innocent purpose of ultimate restitution, or the forger of another's name as indorser of a note plead his purpose to pay the note himself at maturity. It is conceivable even that one might be guilty of larceny by taking another's money to meet some present exigency of his own, while pleading in the forum of conscience his purpose to make it all right at some future day. Such pernicious reasoning can be accepted neither in the forum of conscience nor in that of law. * * *

There was no error in the judgment complained of.

HOOKER v. MIDLAND STEEL CO. ET AL.

1905. 215 Ill. 444, 74 N. E. 445.

THIS was a bill of complaint where a stockholder had sold his stock in the Midland Steel Company to one of the directors. The bill alleged non-disclosures and misrepresentations by the director as to facts affecting the value of the stock.

CARTWRIGHT, J.— * * * The bill averred that Beatty did not make a full and frank disclosure of all facts within his knowledge affecting the value of complainant's stock or which would enable complainant to determine whether it would be best to sell the stock at the price offered or not. It is contended that Beatty, being the president and director of the Midland Steel Company, was a trustee for the complainant as a stockholder, and was therefore in a fiduciary and confidential relation requiring him to disclose all such facts within his knowledge, and that he could not retain a benefit acquired by a breach of that duty or use knowledge in his possession to obtain a bargain from the complainant. The management of the business and property of a corporation is entrusted to its officers, and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body in respect to such business and property, and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. A director, however, does not sustain that relation to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. In the absence of actual fraud such a purchase will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock. The rule as to a director is stated in Cook on Stock and Stockholders (§ 320,) as follows: "There is no confidential relation between

him and a stockholder, so far as a sale of the stock between them is concerned, and so long as he remains silent and does not actively mislead the person with whom he deals the transaction cannot be set aside for fraud." Beatty did not sustain such a trust relation to the complainant, as an individual stockholder, as would prevent him, in the absence of actual fraud, from purchasing the stock. (10 Cyc. 796; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Walsh v. Goulden (Mich.), 90 N. W. 406; 1 Morawetz on Private Corp. 357.) * * *

One rule always adhered to is, that to enable a party to set aside a contract the representations alleged to be false must be relied upon in entering into the contract. (Douglass v. Littler, 58 Ill. 342; Walker v. Carrington, 74 *id.* 446; Fauntleroy v. Wilcox, 80 *id.* 477; Illinois Midland Railway Co. v. Town of Barnett, 85 *id.* 313; Dady v. Condit, 163 *id.* 511; Jones v. Foster, 175 *id.* 459.). Complainant in his bill alleged that he found out that Beatty had made misstatements; that the statements were contradictory and that he was distrustful of him, but alleged that the distrust went only to suspecting that in a doubtful case, where Beatty's own interest could be served by misconstruction, equivocation or sophistry, he would resort thereto, but at the time of the sale he was not convinced that he would perpetrate a deliberate, positive and malicious fraud. These averments, in connection with the other facts stated, show that the sale was not made in reliance upon representations of Beatty, and also that, in view of the knowledge complainant had, a reasonable person would not have relied upon them. Complainant made an independent investigation through his attorney, and being a stockholder he was not compelled to sell or dispose of his stock at all, (Harding v. American Glucose Co., 182 Ill. 551,) and he was not entitled to rely upon representations as to the law. (Fish v. Cleland, 33 Ill. 238.) He had a right of access to the books, records and papers of the corporation for any investigation he chose to make, and he was not required to sell the stock without full information as to all facts affecting its value. It is true that the bill alleged that Beatty denied the possession of any inventory when he had a stock ledger showing the raw and finished material on hand. The bill, however, does not show that this stock ledger would answer the purpose of an inventory, and from the nature of the book the presumption is that it did not contain the values which would be set down in an inventory. The statement is not shown to be false, and, at any rate, the amount of raw and finished material on hand was open, apparently, to sight and observation of complainant's representative or anybody else. It was not alleged that there was any refusal of the privilege of a stockholder to see any of the books of the company, and if there had been it would arouse the suspicion of a reasonable man, and complainant could either insist upon his rights or refuse to sell. * * *

ANTLE & BRO. v. SEXTON ET AL.

1891. 137 Ill. 410, 27 N. E. 691.

BAKER, J.—This was an action on the case, by appellees, against appellants, to recover damages for fraud and deceit in the sale of timber standing on the land of one Jameson. The subjects of the sale were the timber that had been bought by appellants from Jameson, a saw-mill and its appurtenances, and thirteen acres of timber on the Hadley land. The sum of $3,000, in gross, was paid for the property, no separate prices being fixed for the different articles. The ground of fraud relied on was the representation that the tract of timber bought from Jameson contained eighty acres, when in fact the Jameson contract only conveyed to appellants thirty acres of timber. Appellees recovered in the circuit court judgment for $900, and that judgment was affirmed in the appellate court, and the cause was brought here on a certificate of importance.

In the written contract signed by the parties it is recited that the appellants agreed as follows:

"Second—That they hereby assign and transfer to said Sexton & Bybee all interest which they have acquired in and to about eighty acres of saw-timber in Gardner townships, Sangamon county, Illinois, under a contract heretofore entered into by the said N. C. Antle & Bro. with one S. H. Jameson.

"Fourth—They hereby agree to assign over to said Sexton & Bybee the written contracts with said Jameson & Hadley, above referred to."

It is suggested by appellants, that where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is open to inspection, the purchaser cannot be heard to say that he was deceived by the vendor's misrepresentations, and fault is found that the court instructed the jury, that if the representation was made "in such a way and under such circumstances as to induce a reasonably prudent man to believe that the matter stated was true," and if the plaintiffs, "in the exercise of reasonable prudence, believed the representation to be true," etc., it sufficiently sustained the action for deceit. The false representation consisted in misstating the terms of the Jameson contract, and the parties did not stand upon an equal footing in respect thereto. Said contract was in the possession of appellants, and they had full knowledge of its provisions, while appellees did not have access to it, and it was withheld from their inspection upon a plausible pretext stated by appellants. The land upon which the timber grew was in a peculiar shape, and was contiguous to other timber lands, and although the timber was pointed out to appellees, yet it is manifest that without a knowledge of the boundaries and an actual measurement, no person could tell the number of acres in the tract. In numerous instructions given by

the court, the knowledge of appellants that the representation was false, and the fact that the same was made with the intent and for the purpose of deceiving and defrauding appellees, were made conditions precedent to the right of recovery. Surely, where a misrepresentation is made as to a material fact, and such misrepresentation is made knowingly, and for the express purpose of deceiving and defrauding, and the party injured relies upon the statement made, and under circumstances which would induce a reasonably prudent man to so rely, there must be a right of action at law for fraud and deceit. To throw a purchaser out of court in such case, upon the plea he did not avail himself of the means of knowledge open to him, would be offering a premium on fraud, and would be destructive of confidence in business transactions. There was no error of which appellants can complain in instructing the jury as above indicated. Linnington v. Strong, 107 Ill. 295; Endsley v. Johns, 120 *id.* 964; Schwabacker v. Riddle, 99 *id.* 343; Hicks v. Stevens, 121 *id.* 186. * * *

Judgment affirmed.

FARRAR v. CHURCHILL.

1890. 135 U. S. 609.

FULLER, C. J.— * * * The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. Southern Development Company v. Silva, 125 U. S. 247. "If the party to whom the representations were made," remarked Lord Langdale, in Clapham v. Shillito, 7 Beav. 149, "himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which,

upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded." * * *

BRACKETT v. GRISWOLD.

1889. 112 N. Y. 454, 20 N. E. 376.

ANDREWS, J.— * * * The question in this case turns upon the point whether the evidence proved, or tended to prove, a cause of action against the defendant for false and fraudulent representations, within the rules governing the common-law action for fraud and deceit. There is no doubt or question as to what elements are requisite to sustain an action for false pretenses. The essential constituents of such an action have been understood from the time such actions were first maintained. They are tersely stated by Church, C. J., in Arthur v. Griswold, 55 N. Y. 400; viz.: "Representation, falsity, *scienter,* deception, and injury." There must have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he in good faith parted with property, or incurred the obligation which occasioned the injury of which he complains. All these circumstances must be found to exist, and the absence of any one of them is fatal to a recovery. It is not necessary that the false representation should have been made by the defendant personally. If he authorized and caused it to be made, it is the same as though he made it himself. Nor is it necessary that it should have been made directly to the plaintiff. If it was made to the public at large, for the purpose of influencing the action of any individual who may act upon it, any person so acting upon it, and sustaining injury thereby, may maintain an action. It is on this ground that promoters or directors of corporations have been held liable for false representations in a prospectus or reports, or other papers issued by the corporation with their sanction, by which individuals have been induced to purchase the stock, or become creditors of the corporation, and the fact that the false report or prospectus purports to be the act of the corporation, and not of the promoters or directors, does not relieve them from personal responsibility.

In view of the settled principles governing the action for fraud and deceit by means of false pretenses there is upon the evidence presented in this case an insuperable difficulty in maintaining the present judgment. There is no evidence that Bonnell, in purchasing the notes, relied upon any representations made by the defendant. On the contrary, it affirmatively appears that at that time he

was wholly ignorant of the alleged fraudulent scheme under which the Iron Mountains Company was organized, and had no knowledge or information of any of the acts or representations of the defendant or the other parties to the alleged conspiracy set forth in the complaint. He knew nothing of the property of the company, nor of the amount of its capital stock, nor did he know who were the directors or persons interested, and never saw or heard of the report of 1870, or of the prospectus prepared by Remington. * * *

JAMES v. HODSDEN.

1874. 47 Vt. 127.

REDFIELD, J.—This action is to recover the consideration paid for interest in a certain invention or right to procure a patent for an improved knitting-needle. The theory of the case is that the sale was induced by fraud; that the property is worthless; and that the consideration has entirely failed. * * *

The charge of the court, "that it was not necessary that they should find that the plaintiff relied solely on the representations, but it was sufficient if they found the representations were so far relied on by the plaintiff as to constitute one of the inducements of the trade in question," we think sound and reasonable. Under the charge, the jury must have found that the plaintiff was deceived and defrauded; that he was, in fact, cajoled into a purchase of a patent-right interest of no value, and giving his notes for a large sum, by the false assertions and practices of the defendant and his conspirators. It is often said in the cases, that the false representations must have been such that without them the trade would not have been made. But it is never possible for any man, in the aggregate of inducements that effected the sale, to determine whether the result would have been attained with some of the inducements abated; nor should the guilty party seeking the benefit of a sale fraudulent in fact, and induced, in a measure, by his fraud and falsehood, be permitted to allege in excuse that the innocent party might have made the purchase if he had practiced less deceit, and his lies had been less flagrant. If he resorts to unlawful means and accomplishes a fraudulent purpose, the law will not stop to measure the force of such inducements. It is enough that the party was deceived and cheated, and the defendant's falsehood and fraudulent practices contributed to that end. "The misrepresentation must be in something material, in which the party relies and puts confidence, and he is misled and cheated." 1 Story Eq., §§ 197, 203. If a party, induced by the several false and fraudulent declarations of

two persons, different in time and character, purchases worthless property, it would not do to say, that because the trade might not have been made if only one falsehood had been uttered, and the purchase not wholly induced by either, therefore he is without remedy or redress. If a fraud is accomplished, and the unlawful acts of the defendant contributed thereto, he is answerable. The fraudulent acts of the defendant must, indeed, have worked an injury, or there could be no damages and no recovery. But if the wrong has been done, and the defendant is party to its infliction, the court will not apportion the penalties of guilt among offenders, nor divide spoil among highwaymen. * * *

HANDY v. WALDRON.

1896. 19 R. I. 618, 35 Atl. 884.

PER CURIAM.—We think that the verdict is sustained by the evidence. It is not necessary that the plaintiff should have relied solely on the representation of the defendant that the stock was paying 10 per cent. dividends right along, etc. It is enough that it had a material influence on the plaintiff in inducing him to purchase the stock. Insurance Co. v. Matthews, 102 Mass. 225; Grinnell Deceit, § 48, and cases cited. * * *

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§ 59 (1)—False Representation of a Material Fact.

HALL v. JOHNSON.

1879. 41 Mich. 286, 2 N. W. 55.

MARSTON, J.— * * * False representations, no matter how acted upon, will not be sufficient to set aside an agreement, otherwise valid, unless they were material. Immaterial representations, whether true or false, cannot be made the basis of relief, even although coupled with the assertion that they were relied upon. They may constitute a moral wrong, but not a legal one. False representations may be made, of such a character that no person of ordinary intelligence could be misled thereby, and that could have had no influence whatever in inducing the other party to enter into the agreement. What might be considered sufficiently material to induce one person to act, might have little or no influence upon another, so that no definite rule can be laid down. In each case the

court, or jury, must be satisfied that the representations, if made, were untrue, and, as applied to the transactions, were material; of that character that a person of ordinary intelligence, and possessing ordinary business qualifications, would be likely to rely thereon, and be misled thereby. If the person to whom the representations were made was below this standard, which the law presumes all to possess, such facts should be shown, where less material representations were relied upon.

Anything short of this would be unsafe, and would render it exceedingly dangerous for parties to conduct the ordinary business transactions of the day. It frequently happens that representations are made, while negotiations are pending, not strictly true. They may relate to the subject-matter, or have little or no reference thereto. Neither party may place the slightest reliance thereon, yet, should a dispute thereafter arise, how easy for the person who imagined he was injured to assert that he relied upon the representations made—believed them to be true—and, so believing, was thereby induced to make the contract in dispute. It would indeed be difficult to disprove such an assertion, if the materiality of the representations formed no part of the inquiry. The fraud must therefore be material to the transaction. If the representations relate to another matter, or to the one in dispute, in but a trivial and unimportant manner, they would afford no sufficient ground to set aside the contract. 2 Parsons on Contracts 267; Freizel v. Miller, 37 Ind. 1, 10 Am. Rep. 62; Seeley v. Price, 14 Mich. 541; Bristle v. Bandnure, 28 Mich. 192; Whiting v. Hill, 23 Mich. 414; Mizner v. Russell, 29 Mich. 231. * * *

ABBOTT v. TREAT.

1886. 78 Me. 121, 3 Atl. 44.

FOSTER, J.— * * * Prof. Pomeroy, in his work on Equity Jurisprudence, discussing the nature of fraud and misrepresentations cognizable by a court of equity, says:

"A misrepresentation of the law is not considered as amounting to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added that such a statement would rather be the expression of an opinion than the assertion of a fact." 2 Pom. Eq. Jur., § 877.

In Fish v. Cleland, 33 Ill. 243, the principle is expressed in these words:

"A representation of what the law will or will not permit to be done, is one on which the party to whom it is made has no right to rely; and if he does so, it is his folly, and he cannot ask the law to

relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

To the same effect may be cited the following authorities: Upton v. Tribilcock, 91 U. S. 50; Starr v. Bennett, 5 Hill. (N. Y.) 303; Lewis v. Jones, 4 Barn. & C. 512; Grant v. Grant, 56 Me. 573.

By this it should not be understood that we mean to say that there may be no case of misrepresentation in regard to the law where a court of equity would not intervene. It may be that if a party should intentionally deceive another by misrepresenting the law to him, or, knowing him to be ignorant of it, should thereby knowingly take advantage of his ignorance for the purpose of deceiving him, a court of equity would grant relief on the ground of fraud. But we do not feel that this case falls within that principle. * * *

HUBBARD v. McLEAN.

1902. 115 Wis. 9, 90 N. W. 1077.

THIS was an action against an attorney, who caused real estate belonging to his client to be conveyed to plaintiff, to be held in trust by the latter and induced him to execute notes secured by mortgage on the land, by means of false representations, relied on by plaintiff, that he was not personally liable thereon. Judgment for plaintiff. Appeal.

CASSODAY, C. J.— * * * The representation here alleged related to the legal effect of a then present transaction, made by the request and direction of a learned lawyer knowing all the facts, acting as the adviser and counselor of the plaintiff's father, addressed to the plaintiff, who was ignorant of the facts and the law applicable, and who had no interest in the transaction, except to carry out what he supposed to be the wish of his father as expressed by the defendant, upon whose statements he relied. True, this court has held in a case cited by counsel for the defendant that: "A false or mistaken representation of what the law is upon an admitted state of facts is no basis of an action, especially where there are no confidential relations between the parties." Gormely v. Association, 55 Wis. 350, 13 N. W. 242. That proposition is well sustained by authority. 14 Am. & Eng. Ency. Law (2d ed.) 54. But it is there said that: "If a promise to do something in the future is accompanied by false statements as to existing facts, or an intentional concealment of facts which the promisor is under a duty to disclose, the rule that a

mere promise does not constitute fraud does not apply. In such a case the fraud consists, not in the promise, but in the false representation or concealment. It is immaterial in such cases that the promise, as well as the representation of fact, was relied upon; for a false representation, to amount to fraud, need not be the sole inducement for action." The same authority states that: "It has repeatedly been held that the general rule as to representations of law does not apply where a relation of trust or confidence exists between the parties, nor if the person making the representation knows that the other is ignorant of the law, and takes advantage of his ignorance to mislead him by a false statement of the law. In such cases the representation may constitute fraud in equity, and even at law." *Id.*, p. 57. Among the numerous cases cited in support of the proposition is a case from Alabama, in which it is said, and in effect held, by the court, that: "If any peculiar relationship of trust or confidence existed between the parties, and the plaintiff has availed himself of such trust or confidence to mislead the defendant, by a misrepresentation as to the legal effect of the contract, it would constitute a fraud. So, if the defendant was in fact ignorant of the law, and the other party, knowing him to be so, and knowing the law, took advantage of such ignorance, to mislead him by a false statement of the law, it would constitute a fraud." Townsend v. Cowles, 31 Ala. 428, 436. * * *

GORDON v. PARMELEE.

1861. 2 Allen (Mass.) 212.

BIGELOW, C. J.—The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defense to the notes. They fall within that class of affirmations, which, although known by the party making them to be false, do not as between vendor and vendee afford any ground for a claim of damages either in an action on the case for deceit, or by way of recoupment in a suit to recover the purchase money. They come within the principle embodied in the maxim of the civil law, *simplex commendatio non obligat.* Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land, or its adaptation to a particular mode of culture, or the capacity of the soil to

produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them; and if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property. * * *

GUSTAFSON v. RUSTEMEYER.

1898. 70 Conn. 125, 39 Atl. 104.

TORRANCE, J.—The first question to be considered is whether the court erred in sustaining the demurrer to the counterclaim. The false representation therein set out and relied upon relates simply to the worth of the Julius street property over and above incumbrances. It is a mere naked representation of the value of an equity of redemption, and nothing more. The general rule is that a mere naked assertion of the value without more, made between vendor and vendee during negotiations for a sale, though untrue, and known to be so by the one who makes it, and relied upon by the other, to his hurt, does not constitute an actionable deceit; and this for the reason that such an assertion, in most cases, is, and is understood to be, the statement of an opinion, and not of a fact, and the party to whom it is made has no right to rely upon it, and, if he does so, his loss, if any occurs, is held to be the result of his own folly. 1 Big. Fraud, p. 490; Parker v. Moulton, 114 Mass. 99; Morse v. Shaw, 124 Mass. 59; Homer v. Perkins, *Id.* 431; Ellis v. Andrews, 56 N. Y. 83; Chrysler v. Canaday, 90 N. Y. 272; Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367. See, also, cases cited in note to Cottrill v. Krum, in 18 Am. St. 556 (s. c. 100 Mo. 397, 13 S. W. 906). There are, undoubtedly, exceptions to this general rule, arising out of the special circumstances under which the representation as to mere value is made,—as, for instance, where the one who makes the representation holds a position of trust or confidence towards the other, which gives the latter a right to rely on the representation, or where the seller has, or assumes to have, special knowledge of the value of the property, and the buyer has no knowledge thereof, and the latter, to the seller's knowledge, trusts entirely to the seller's

representation. In such cases the seller may justly be held liable for his false representations, because by them the buyer is fraudulently induced to forbear inquiry as to their truth. A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable, unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was thus induced to forbear inquiry must be specifically set forth in the pleading. "To such representations the maxim *caveat emptor* applies. The buyer is not excused from an examination unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only." Parker v. Moulton, 114 Mass. 99, 100; Ellis v. Andrews, *supra;* Chrysler v. Canady, *supra.* Upon the counterclaim, as it stands, the defendant's case falls within the general rule, and not within any of the recognized exceptions. If he desired to bring it within any of these exceptions, he should have alleged the specific facts which would bring it within one of them; but this he did not do, and for this reason the demurrer was properly sustained. * * *

MURRAY v. TOLMAN.

1896. 162 Ill. 417, 44 N. E. 748.

In this case the president of a bank made representations to a customer that stock in a corporation of which he was the promoter and principal stockholder was worth a sum in excess of its par value, would yield certain dividends, and prove a profitable investment. He knew at the time that it was the intention to do business not authorized by the charter and to so manage it that he and the bank would acquire all the assets.

Carter, J.— * * * We are disposed to agree with the views expressed by Mr. Justice Waterman in his dissenting opinion in the Appellate Court, that Tolman was in a position to know what the value of the stock was, and necessarily had knowledge of its value which no other person could obtain except with his consent and assistance, and that, in view of all the circumstances, Murray did as men of ordinary business experience would likely do under such circumstances if they decided to take the stock,—that is, decided to take it relying upon the statements and representations of Tolman,—and that cases of this character fall within well recognized exceptions to the general rule that the vendee is not authorized to rely upon the statements of the vendor as to the value of the subject

matter of the contract as representations upon which he may avoid the contract if shown to be false, but that "where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to value, and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound." Pomeroy's Eq. Jur., §§ 878, 879; Pickard v. McCormick, 11 Mich. 68.

Much that was said by Judge Campbell in delivering the opinion of the court in the Pickard case might well be said of the case at bar. "It is undoubtedly true," he said, "that value is usually a mere matter of opinion, and that the purchaser must expect that a vendor will seek to enhance his wares and must disregard his statements of their value. But while this is generally the case, yet we are aware of no rule which determines, arbitrarily, that any class of fraudulent misrepresentations can be exempted from the consequences attached to others. Where a purchaser without negligence has been induced, by the arts of a cheating seller, to rely upon material statements which are knowingly false, and is thereby damnified, it can make no difference in what respect he has been deceived if the deceit was material and relied on. It is only because statements of value can rarely be supposed to have induced a purchase without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain. * * * In the case before us the alleged fraud consisted of false statements by a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's ignorance, and deliberately and designedly availed himself of it to defraud him. We think that it cannot be laid down as a matter of law that value is never a material fact, and we think the circumstances of this case illustrate the impropriety of any such rule. They show a plain and aggravated case of cheating, and it would be a deserved reproach to the law if it exempted any specific fraud from a remedial action where a fact is stated and relied upon, whatever may be the general difficulty of defrauding by means of it." See, also, Kost v. Bender, 25 Mich. 515; Allen v. Hart, 72 Ill. 104, is to the same effect. See Holdom v. Ayer, 110 Ill. 448. * * *

A statement by the seller as to the price paid by him or offered to him has been held in some cases to be mere "dealer's talk" and in others a statement of fact upon which the buyer might rely. See Benjamin's "Principles of Contract," p. 211.

KILGORE ET AL. v. BRUCE.

1896. 166 Mass. 136, 44 N. E. 108.

ALLEN, J.—The plaintiffs contend in the first place that the alleged misrepresentations were not available in defense, because they were merely promissory in their character, and because they amounted to no more than dealer's talk, which the law cannot take notice of. According to the report, the plaintiff Kilgore had all of the shares of the company in his hands for sale, and was negotiating at the same time with the defendant, with West, and with Whitney, to sell a part of them to each. He told the defendant that all the stock should be sold, or none, and falsely and fraudulently represented that all the stock he was selling to either of the three purchasers was being sold for the same price, to wit, $1,400 per share, and that this was the price which Whitney, in especial, was paying. These representations were made in answer to specific questions put by the defendant, who told Kilgore that he would not make the purchase unless these were the facts. Being induced thereby, the defendant accordingly took 50 shares at $1,400 a share; but Kilgore had in fact already secretly agreed to sell 61 shares to Whitney at $1,221.42 per share, which agreement was carried out. The separate sales to the defendant, to Whitney, and to West were all consummated at about the same time. It is not stated in what order they were made. Nor is this material. In effect, they were contemporaneous. All these sales were to be made, or none. There is no room, therefore, for the suggestion that the representations of Kilgore to the defendant were merely promissory in their character; and we have no occasion to consider the question whether the defendant would be able to avail himself of them in defense, under his answer, if they were merely promissory. They were misrepresentations as to what the plaintiff Kilgore was doing at the very time when he was negotiating with the defendant. Nor do they fall within the class of such lying talk as dealers may indulge in with legal impunity. We have recently intimated our disinclination to extend this impunity further than is established by existing decisions. Way v. Ryther, 165 Mass. 226, 42 N. E. 1128. Misrepresentations as to the price paid by a third person, or as to the selling price, have heretofore been held actionable or indictable. Manning v. Albee, 11 Allen (Mass.) 520; Belcher v. Costello, 122 Mass. 189; Com. v. Wood, 142 Mass. 459, 8 N. E. 432; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779. * * *

BRALEY v. POWERS.

1898. 92 Me. 203, 42 Atl. 362.

WHITEHOUSE, J.—This was an action to recover damages for fraudulent representations in the sale of an interest in letters patent for the manufacture of harness buckles. The false representation set out in the plaintiff's writ, and relied upon at the trial, was that the defendant "had a quantity of said buckles on hand, consisting of two sizes, which cost him thirty and thirty-five cents per dozen, respectively, samples of which said buckles he then and there exhibited to the plaintiff, and then and there affirmed that he could get all the buckles which they desired to sell at said prices, respectively, and then and there affirmed that said buckles could then and there be sold at sixty-five and seventy-five cents per dozen, respectively, and then and there double the cost."

The plaintiff paid the defendant $800 for one-third interest in the patent, and recovered a verdict for $500. The case comes to this court on exceptions to the rulings of the presiding justice, and also on a motion to set aside the verdict as against evidence.

1. Evidence was admitted under objection, to prove the allegation above set forth; but the court was requested to instruct the jury that this representation by the defendant concerning the cost of the buckles was not a statement of a material fact, and, if false, was not actionable. The defendant excepted to the refusal of the presiding judge to give this instruction.

It is undoubtedly a reasonable rule of the common law, uniformly recognized in this state, that representations of the value of real or personal property which is itself the subject-matter of bargain and sale, or of the price paid or offered for it in a particular instance, are so manifestly statements of opinion on the part of the seller, or mere evidence of the opinion of others respecting its value, that they cannot be deemed statements of material facts which will lay the foundation of an action for deceit, even if the statements are false and intended to deceive. Bishop v. Small, 63 Me. 12; Rhoda v. Annis, 75 Me. 17; Bourn v. Davis, 76 Me. 223; Palmer v. Bell, 85 Me. 352, 27 Atl. 250.

But even in this class of cases, when the statements relate directly to the subject-matter of the sale, it was held in Manning v. Albee, 11 Allen (Mass.) 520, that false representations that certain railroad bonds were selling in the market at a given price entitled the plaintiff to maintain an action; there being no evidence that the plaintiff had equal means of knowing the truth or untruth of the statements, or that he might not rely upon them without the imputation of negligence. See, also, Com. v. Wood, 142 Mass. 460.

In Coolidge v. Goddard, 77 Me. 578, 1 Atl. 831, it was held that a false representation by the defendant, in effecting the sale of shares

in an electric light company, that he and all other stockholders had paid to the company the par value of the stock, constituted a legal fraud, as it affected directly the value of the stock.

In Hoxie v. Small, 86 Me. 23, 29 Atl. 920, the seller of shares in a contract for the purchase of real estate made false representations in regard to the amount paid for them to the owner of the land; and the court held them actionable, saying: "They affected directly the value of the interest which the defendant was selling. The defendant was not selling tangible property. He was selling a fractional interest in a contract. And the value of that contract depended largely, if not wholly, upon the amount of payments that had been made upon it."

So in the principal case the defendant was not selling "tangible property," but an interest in a patent right for the manufacture of buckles. The value of the invention obviously depended upon the margin of profit between the cost of manufacturing the buckles and their selling price. Statements in regard to their cost were therefore material, as directly affecting the value of the right to manufacture them. The representations immediately following, that he could furnish all the buckles they wanted at the price named by him, at the cost of those exhibited, and that they could be sold so as to double the cost, were not in themselves statements of existent facts, but were merely predictions and expressions of opinion. They served, however, to give significance and force to his positive statement of the cost of those exhibited. Considered in connection with these accompanying expressions of opinion, the representation that the buckles shown to the plaintiff were manufactured for 30 and 35 cents per dozen, respectively, were well calculated to convey to the mind of the plaintiff the idea that those buckles were manufactured at that cost under ordinary conditions, and not under exceptionally favorable circumstances. * * *

O'DONNELL & DUER BREWING CO. v. FARRAR.

1896. 163 Ill. 471, 45 N. E. 283.

WILKIN, J.— * * * As to the second question, it is undoubtedly true that some of the representations set up in the bill amount to no more than the expression of an opinion as to the value of the property and business or a recommendation of the property of the seller. Certainly, whether the saloon was first-class in every respect and was well fitted up were matters about which the purchasers could judge as well as the seller, and whether the business would yield a profit of $4,000 in two years was the expression of an opinion, which the law would not treat as fraudulent. On the other

hand, that the saloon was doing a profitable business, mostly glass trade, and especially that the income was $20 per day, were statements of fact which, if false (as they were found to be by the court below), would entitle the complainants, upon discovery of the real facts, to a rescission of the contract. Allin v. Millison, 72 Ill. 201; Hicks v. Stevens, 121 *id.* 186. * * *

GAGE v. LEWIS.

1873. 68 Ill. 604.

SCHOLFIELD, J.— * * * The other representations, upon the faith of which it is alleged the defendant Gage signed the bond, do not constitute such a fraud as, in the law, renders the consideration void. They are, in substance, that the plaintiff promised and agreed, to and with the defendant, that if the defendant would sign the bond the plaintiff would retire from and forever quit carrying on the wholesale hat, cap, fur and buck goods business in Chicago, and would, in no manner, compete with the new firm, of which the defendant was to become a member, in such business; and that the defendant, wholly relying upon such representations and promises, and for no other consideration whatever, did, etc. It cannot be said that these representations and promises were false when made, for, until the proper time arrived, and plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract.

"As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law." Kerr on Fraud and Mistake, 88. So it is said in Bigelow on Estoppel, 481: "The representation or concealment must, also, in all ordinary cases, have reference to a present or past state of things; for if a party make a representation concerning something in the future, it must generally be a statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract." * * *

HADCOCK v. OSMER.

1897. 153 N. Y. 604, 47 N. E. 923.

VANN, J.— * * * An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception, and consequent loss. But, while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true; and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it, to his injury, the result is actionable fraud. Kountze v. Kennedy, 147 N. Y. 124, 130, 41 N. E. 414; Rothschild v. Mack, 115 N. Y. 1, 7, 21 N. E. 726; Marsh v. Falker, 40 N. Y. 562, 573; Bennett v. Judson, 21 N. Y. 238; Add. Torts 1007; 1 Bigelow Fraud 514. Such seems to be the case now before us, as the facts are presumed to have been found by the jury. The plaintiff's testator did not ask for information in regard to the solvency of those who wished to borrow money of him, but the defendant volunteered to give it. He was interested in the result of the loan, for the bulk of the proceeds was for his benefit. On being told that the loan would not be made without his presence, he armed the proposed borrowers with a written statement over his own signature, containing a positive assertion of a material fact, with the intention that it should be acted upon, and should induce the loan of the money. Yet he did not know the assertion thus positively made for such an important purpose to be true, and he did not investigate or seek to discover whether it was true or not, although he had dealt some with the Browns, and had some information as to their circumstances. He intended, as the jury has found upon sufficient evidence, that the lender should understand him as communicating his actual knowledge, and not as expressing his opinion, judgment, or belief. Knowing that he did not know what he said he did, and what he intended to cause another to believe he did, he took the responsibility of its truth; and honesty of belief in the supposed fact, under such circumstances, cannot relieve him from the imputation of falsehood and fraud. As was said by Judge Peckham in Rothschild v. Mack, *supra:* "He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and endorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. * * * He certainly meant to convey the

impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false, or else he was conscious that he had no actual knowledge while assuming to have it, and intending to convey such impression. If damage ensue, this makes an actionable fraudulent representation." The language of Chief Judge Andrews, in Kountze v. Kennedy, *supra,* is equally applicable: "One who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented; and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent, in the absence of explanation, naturally results." The rule is the same in other states and in England. Thus, in Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, the court said: "The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made as of the party's own knowledge, which is false, provided the thing stated is not merely matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." See also, Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566; Hexter v. Bast, 125 Pa. St. 52, 17 Atl. 252; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Swayze v. Waldo, 73 Iowa 749, 33 N. W. 78; Craig v. Ward, 1 Ab. Dec. 454; Evans v. Edmonds, 13 C. B. 777. The charge of the learned trial judge was within these rules, and the exceptions under consideration furnish no ground for a reversal of the judgment. * * *

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§ 59 (2)—Active Concealment of a Material Fact.

CROYLE v. MOSES.

1879. 90 Pa. St. 250.

THIS was an action on the case to recover damages for the fraudulent sale of a horse. Soon after the sale, plaintiff discovered that the horse was a *cribber* or *wind-sucker.* At the trial below the plaintiff submitted certain points which the court answered as follows:

"The defendant was not bound to inform the plaintiff that his horse was a cribber. He had a right to remain silent, and let the purchaser examine for himself, and buy on his own judgment. It is for you to say, from the evidence, if he did so.

"A seller has no right, by words or acts, to mislead a buyer, and prevent an examination or inquiry. But a mere evasive answer is not, of itself, equivalent to a warranty. In morals, it is doubtless true that a man ought to frankly tell his horse's defects to a prospective buyer. But the law does not require this. The seller may keep the horse's defects to himself, if he does not warrant, nor make false representations, nor fraudulent concealment, and the buyer has an opportunity to inspect and test the horse, and buys on his own judgment. The mere short hitching of the horse to a fence, accompanied by the defendant's statement that he thus hitched him to keep him from rubbing the saddle, would not of itself, be a false representation, equivalent to a warranty, if the buyer bought on his own judgment, and after an express refusal on the part of the defendant to warrant the horse."

The verdict was for defendant, when plaintiff took this writ.

MERCUR, J.— * * * The learned judge appears to have overlooked the distinction between warranty and deceitful representations. As was said in Krumbharr v. Birch, 2 Norris (Pa.) 426, "It needs no citation of authorities to prove that the wilful misrepresentation or concealment of a material fact by the vendor constitutes a fraud." But fraudulent representations may be as well by arts or artifices calculated to deceive, as by positive assertions. 2 Kent Com. 483; 1 Story Eq., § 192; Brightley's Eq., § 55; Cornelius v. Molloy, 7 Barr (Pa.) 293.

Although no answer to the points, yet in the absence of artifice or deceitful representations, the jury was correctly told "the defendant was not bound to inform the plaintiff that the horse was a cribber. He had a right to remain silent and let the purchaser examine for himself and buy on his own judgment." The jury was also correctly instructed that "a seller has no right, by words or acts, to mislead a buyer and prevent an examination or inquiry." The error was committed in the next sentence, which declared, "But a mere evasive answer is not of itself equivalent to a warranty." This is undoubtedly true, but is no answer to the points. The request was not for instructions as to what constituted a warranty or what answers were equivalent to a warranty, but as to the effect of fraudulent acts and declarations in the absence of a warranty. The court again interwove the warranty saying: "The seller may keep the horse's defects to himself, if he does not warrant nor make false representations nor fraudulent concealment, and the buyer has an opportunity to inspect and test the horse, and buys on his own judgment. The mere short hitching of the horse to a fence, accompanied by the defendant's statement that he thus hitched him to keep him from rubbing the sad-

dle, would not of itself be a false representation equivalent to a warranty, if the buyer bought on his own judgment, and after an express refusal on the part of the defendant to warrant the horse." Thus the prominent thought expressed in the answer of the court relates to a warranty, while no such question was presented in the points. They called for no instructions that any "false representations were equivalent to a warranty;" nor that "the mere short hitching of the horse," and the defendant's statement relating thereto, were of themselves equivalent to a warranty. The question presented by the points was substantially, if at the time of the sale the horse was known to the defendant to be "a cribber or wind-sucker," and this fact was artfully concealed by him to the injury of the plaintiff, whether it was such a concealment of a latent defect as would avoid the contract. The points submitted did not rest on the mere facts that the horse was hitched short and the reasons assigned therefor, but also on the additional facts that the defendant knew him to be a crib-biter, and resorted to this artifice to conceal it, and gave an untruthful reason to mislead and deceive the plaintiff. The complaint is not for a refusal or omission to answer, but for an evasive and artful answer. That the horse was actually a crib-biter, and so known to the defendant, was clearly proved. Whether that defect made him unsound was fairly submitted to the jury, under the evidence. That it lessened his market value seems to admit of no doubt. If the jury should believe, as the plaintiff testified, that he said to the defendant, "If there is anything wrong with the horse, I do not want him at any price," and that the defendant, with knowledge that he was a crib-biter, answered the plaintiff artfully and evasively, with intent to deceive him, and did thereby deceive him to his injury, it was such a fraud on the plaintiff as would justify him in rescinding the contract. The answer of the court, blending warranty with fraudulent artifices, failed to present the latter to the mind of the jury in a proper manner. The answer was calculated to mislead them as to the law applicable to that branch of the case. Relf v. Rapp, 3 W. & S. (Pa.) 21; Wenger v. Barnhard, 5 P. F. Smith (Pa.) 300; Gregg Township v. Jamison, *id.* 468; Stall v. Meek, 20 *id.* 181. * * *

Judgment reversed.

COLES v. KENNEDY.

1890. 81 Iowa 360, 46 N. W. 1088.

IN this case a subscription for corporate stock in a mining company was obtained by the representation that a prominent business man (S. H. Mallory), had agreed to take 5,000 shares of the stock, but the fact that he was not to pay for his stock was concealed.

GIVEN, J.— * * * S. H. Mallory had resided in Chariton for many years, and was known in the community as a man of large business experience and capacity, and a successful business man, whose name as a subscriber would be influential in inducing others to take stock in the mining company. While it is true that Mr. Mallory's name follows that of appellee on the subscription list, it appears that he had agreed to take stock previous to the time the list was circulated for signatures, and that the fact of his agreeing to take 5,000 shares of the stock was held out to appellee as an inducement to execute the contract in question. The testimony shows that Mr. Mallory was to have his stock free of charge, and that it was given him to secure the influence of his name in procuring appellee and others to subscribe. The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the 5,000 shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for 5,000 shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for stock, and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught. * * *

This case illustrates the old adage, that, half a truth is a lie.

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§ 59 (3)—Act or Conduct Fitted to Deceive.

LOMERSON v. JOHNSTON.

1890. 47 N. J. Eq. 312, 20 Atl. 675.

GARRISON, J.—We agree with the learned vice-chancellor, who heard this cause, in all of his conclusions upon the testimony. The case shows in the clearest manner that Lomerson, the appellant, being involved with Mr. Johnston, as surety and endorser, visited Mrs. Johnston for the purpose of securing himself against loss through the husband by obtaining from the wife a mortgage upon the house left to her by her father. The case further shows, and the vice-chancellor so finds, that, in attaining this object, Lomerson made to Mrs. Johnston a number of statements, all tending to excite in her mind the liveliest apprehensions that her husband was about to be lodged in jail for debt. The court of chancery by its decree set aside the mortgage thus obtained, considering that it was executed under a species of duress. With the result reached we agree, resting our de-

cision, however, upon the ground that it is inequitable to permit the complainant to retain a security for the husband's debt obtained by allowing a false apprehension as to the husband's danger to affect the mind of the wife. That this apprehension was the sole consideration for the wife's compliance is not more clear than that the efficient element of that apprehension—namely, the belief in the imminence of the anticipated arrest—was not only false, but was so to the knowledge of Lomerson.

In order to establish a case of false representation, it is not necessary that something which is false should have been stated as if it was true. If the presentation of that which is true creates an impression which is false it is, as to him, who, seeing the misapprehension, seeks to profit by it, a case of false representation. In the present instance Mrs. Johnston naturally gathered from the statements made to her by Lomerson that her husband had committed crimes for which he not only could and would be imprisoned, but that his arrest was at hand. The imminence of the danger was the sole motive for the execution of the mortgage. In any other view of the transaction her haste is incomprehensible. Notwithstanding the importance of the demand made upon her, she took no time to reflect, held no consultation with her friends, sought no advice. Her one object was to act quickly—to be beforehand. And yet this notion of the imminence of her husband's arrest was just one part of the impression produced upon her mind by Lomerson's statements which were false, and which he knew to be false. From this time on, the case becomes one of false representation, not because falsehoods were stated as if they were facts, but because the state of mind produced falsely represented the facts. To take advantage of such a state of mind is to profit by a false representation.

The decree below is affirmed, with costs.

BROWER v. GOODYER ET AL.

1883. 88 Ind. 572.

ELLIOTT, J.—The appellant bought goods of the appellees which they replevied in this action, proceeding on the theory that the property was obtained from them by fraud.

Property obtained by fraud may be replevied by the seller from the buyer. If, however, the rights of innocent third persons have intervened it is otherwise, in cases where the former intended to transfer title by sale. Parrish v. Thurston, 87 Ind. 437. * * *

Where a man, knowing himself to be insolvent, conceals his insolvency from the vendor of goods, and buys the property not intending

to pay for it, he perpetrates a fraud which will entitle the seller to reclaim the property. The principle which rules this case is thus stated by the supreme court of the United States in Donaldson v. Farwell, 93 U. S. 631: "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. Byrd v. Hall, 2 Keyes (N. Y.) 647; Johnson v. Monell, *Id.* 655; Noble v. Adams, 7 Taunt. 59; Kilby v. Wilson, Ryan & Moody, 178; Bristol v. Wilsmore, 1 Barn. & Cress. 513; Stewart v. Emerson, 52 N. H. 301; Benjamin on Sales, § 440, note of the American editor, and cases there cited." In addition to the authorities cited in the opinion from which we have quoted, we refer to Henshaw v. Bryant, 4 Scam. (Ill.) 97; Patton v. Campbell, 70 Ill. 72; Donaldson v. Farwell, 5 Biss. (U. S.) 451; Seligman v. Kalkman, 8 Cal. 207; Bidault v. Wales, 19 Mo. 36; Dow v. Sanborn, 3 Allen (Mass.) 181; O'Donald v. Constant, 82 Ind. 212. A recent writer thus states the rule: "In other words, a purchase on credit with a preconceived design on the buyer's part, formed at or before the purchase, not to pay for the thing bought, constitutes a species of fraudulent concealment." 2 Pom. Eq., § 906.

A fraudulent intent may be established by circumstances, and need not be proved by direct evidence. In this instance the evidence convincingly shows that the appellant knowingly and fraudulently concealed his insolvency, and that he bought appellees' property intending to defraud them and secure it without paying them the agreed price.

Judgment affirmed.

KELSEY, ROBERSON & CO. v. HARRISON.

1883. 29 Kan. 143.

AT the commencement of the action in this case, the plaintiffs obtained an attachment against the property of the defendant, and levied thereon. One of the grounds for attachment, as stated in the affidavit therefor, was, "that the defendant fraudulently contracted the debt for which suit is about to be brought."

HORTON, C. J.— * * * The defendant filed his motion asking a dissolution of the attachment, and the discharge of the property taken thereunder, and in such motion denied the truthfulness of the attachment affidavit. Upon the hearing several affidavits were read and considered; the court sustained the motion, and ordered the at-

tachment discharged and set aside. The order and ruling of the court are complained of. * * *

Concerning the claim that the debt sued upon was fraudulently contracted, it is contended that at the time defendant contracted the debt with plaintiffs he was insolvent, and that as he concealed such fact from the sellers, it was, considering the other circumstances in proof, such a measure of bad faith as constituted a fraudulent contracting of the debt within the meaning of the attachment law. The facts do not in any way show that the debt was fraudulently contracted. There is nothing in the evidence that he made his purchases at other than the usual times, and in the regular course of his business. No false or other improper representations were made by him at the time of his purchases to the plaintiffs or other parties in regard to his condition tending to mislead and induce them to give him credit which they would otherwise have withheld. It is true that some of the evidence tends to show that for some time he had been running behind; to use his own words, "going down for several years;" that his trade was falling off, and his business drifting rapidly in a bad condition; but there is no evidence showing intentional concealment at the time of his purchases, or any intention at such time to cheat his creditors; nor can we say there was at that time any actual intention on his part to do any act, the necessary result of which was to cheat and defraud plaintiffs or others. As was said in Nichols v. Pinner, 18 N. Y. 299: "But it is clear that such intention (to cheat and defraud another) is not necessarily inferable from the fact that a man in good credit, going on with his regular business matters as usual, purchases for the purpose of continuing that business, after he is made aware that his property is not sufficient to pay his debts. It is not fraudulent in him to use reasonable efforts to retrieve his fortune and to extricate himself from his embarrassment. It is not unnatural that he should cling to the hope that better times would come; that to-morrow will be as this day, and much more abundant; and that with this hope, however delusive results may have shown it to be, he should have been impelled to buy more goods, contract new debts, and struggle on until he find himself in hopeless bankruptcy. This is an everyday experience in the commercial world, and it would be hard indeed if the unfortunate victim of hopes that looked to him at the time as reasonable, must, in his misfortunes, be judged by the actual instead of the possible results. The authorities do not sustain any such harsh doctrine, but the reverse."

Now, to sustain the claim of plaintiffs upon the ground of fraud, the affidavits must have established that defendant made the purchases of plaintiffs with the preconceived design not to pay, or what is the same, that he intended to commit a fraud at the time he made his purchases of the plaintiffs, which were not paid for at the commencement of this action, and that he deliberately proceeded to con-

summate such fraud. This is not shown. The most that can be alleged, and which was proved upon this point, is that defendant at the time of making his purchases was going down, and had been for years, and that of this fact he failed to advise the vendors at the time.

The order and judgment of the district court must be sustained.

SYRACUSE KNITTING CO. v. BLANCHARD.

1899. 69 N. H. 447, 43 Atl. 637.

CHASE, J.—This action is based on the theory that the title to the goods in question never passed from the plaintiffs in Crapo, because of his fraud in effecting the alleged contract of sale. To establish the fraud, the plaintiffs rely upon Crapo's false representation in the letter of August 16th and his suppression of the facts concerning his financial condition. The question here is not whether fraud may be properly inferred from these circumstances, as a matter of fact, but whether there is anything in them which constitutes fraud, as a matter of law.

1. The only false representation contained in the letter was this: "I can safely promise you that our dealings, if you wish to continue them, will be more satisfactory than last season." He had not paid the plaintiffs promptly for the goods purchased of them the preceding season, and the representation related to that matter. It would generally be understood as a promise to be more prompt in his future payments. The word "safely" was apparently used to express inferentially his opinion that his financial ability and prospects justified him in making the promise. His further statement that he was to have additional capital, and that he expected to profit by his past experience, seems to strengthen this view. The finding that the statement was unreasonable and untrue tends to show that it was regarded at the trial term as the expression of an opinion or expectation. If so regarded, it might be unreasonable, and, as it was not fulfilled, in a sense untrue. If this view of the character of the statement is correct, it did not constitute fraud, although it was not true. Lyons v. Briggs, 14 R. I. 222; Jude v. Woodburn, 27 Vt. 415. "A representation which merely amounts to a statement of opinion, judgment, probability, or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural, or exaggerated statement, goes for nothing." Messer v. Smyth, 59 N. H. 41, 43; Cooley Torts 483. Unless the plaintiffs were willing to accept the statement for what it was worth as a promise, ordinary prudence would seem to require them not to rely upon it, but to call for the facts upon which the opinion or expectation was founded. If the language used can

properly be construed as a statement of Crapo's financial condition, and the statement is not too indefinite or general to justify reliance upon it, there would be a preliminary question of fact to be determined before it could be regarded as constituting an element of fraud, namely, whether it was a statement of opinion or a statement of fact. If there is such a question in the case, the parties must go to the trial term for its determination. Morrill v. Wallace, 9 N. H. 111; Messer v. Smyth, *supra;* Stewart v. Sterns, 63 N. H. 99, 105; Morse v. Shaw, 124 Mass. 59. * * *

In the case under consideration, although it was unreasonable for Crapo to expect he could continue business and pay for the goods received from the plaintiffs, there is evidence having some tendency to show that he intended to pay for them, and it is found that he did not have a specific intention not to do so. He continued his business more than two months and a half after receiving the goods, and nearly a month and a half after the payment became due. In the end he did not go out of business voluntarily, but was forced out by insolvency proceedings begun by his creditors. It does not appear that he concealed or in any way incumbered his stock in trade, nor that he misappropriated any of the money arising from the business. It may be that he intended to pay the plaintiffs from the receipts of the business, but was induced by the activity and persistence of other creditors to use the receipts in paying them. It is a matter of common knowledge that the plans of insolvent purchasers are sometimes overruled in this way. That there is evidence having the opposite tendency, and perhaps more weighty, furnishes no answer to this suggestion, but simply shows that the question is one of fact, and not of law. It is difficult to define fraud, except in a very general way. It is variable, depending upon the circumstances of the case. Those who make use of it adopt ways that have the appearance of good faith. Great skill is often shown in the attempt to make that which is false and corrupt appear true and honest. Hard and fast rules of law would be a hindrance to the discovery of fraud. Whether a transaction is fraudulent is generally a question of fact. Of course, the circumstances attending the transaction must be weighed in the light of legal principles; but if, upon such consideration, it is found that a person has fraudulently misled another to his injury, and without his fault, fraud is found. The rule making the intent the principal element of fraud in cases like the one under consideration goes as far in the way of definition as justice requires. To introduce into it the element of reasonableness of the purchaser's expectation as to payment would narrow it, and tend to defeat the ends of justice. It would attach to the contract of sale a contingency that the law has not heretofore recognized. Many purchasers of goods are insolvent in a legal sense, but it has not been generally understood that their title to the goods depended upon the reasonableness of their expectation of paying for them. If such were the rule, attachment and in-

solvency laws would be largely superseded by the efforts of vendors to reclaim the goods sold when the purchaser failed or became insolvent. Vendors do not need such a rule for their protection. They are fully protected by the rule as it now stands—making the fraud depend upon the intent, and leaving the reasonableness of the purchaser's expectation in respect to payment to be considered by the jury in connection with all other circumstances bearing upon the good faith of the sale. The fraud by which Crapo, about December 20, induced the plaintiffs not to reclaim a portion of their goods did not affect the contract of sale. If the title to the goods passed to Crapo when they were delivered to him, it could not be defeated by his subsequent fraud. * * *

BIDAULT ET AL. V. WALES ET AL.

1855. 20 Mo. 546.

LEONARD, J.—This judgment must be reversed on account of the instruction given to the jury as to the law of the case.

When it was here before (19 Mo. 36), this court held in substance that a purchaser did not acquire a valid title to property if he got it under the mere form of a purchase, made with a preconceived design of never paying for it; but that mere inability to pay, even if known to the purchaser at the time of the purchase and concealed from the seller, did not avoid the sale; and we think the law was correctly laid down; but however that may be, it was the judgment of this court, and must be submitted to as the law of the case.

The plaintiff amended by inserting an averment to the effect that the party "purchased and received the property without any intention of paying for the same, and with the purpose of cheating and defrauding the plaintiffs out of their property," and upon a jury trial the court instructed that "if Whiting (the purchaser) at the time of the purchase of the sugar in question, was in good or ordinary credit, on a sale of ten or twenty days, but in fact was unable to pay at the time agreed upon between the parties, and was aware of his inability in this respect, and the jury shall further find that he did not, at the time of said purchase, intend to meet his engagements, but that said purchase was but a contrivance on his part to sustain his credit, the plaintiffs are entitled to a verdict; otherwise the jury will find for defendants."

Under this direction, the jury would of course find for the plaintiffs, if they thought the purchaser was unable to pay when he bought, and that he knew this and concealed it from the plaintiffs, and bought for the purpose of sustaining his own credit, and without any expectation or intention of meeting the payment on the day it fell due, although hoping and intending ultimately to pay.

And it has been argued here, that this instruction contains every element necessary to constitute a fraudulent purchase according to the law laid down upon the former occasion, and indeed that it even goes in favor of the purchaser beyond what we deemed to be the law, in directing the jury that they must also be satisfied that the purchase was but a contrivance on the part of the buyer to sustain his own credit. We think quite otherwise, and that the instruction was very unfortunately expressed, if the purpose of it were (as we must presume it was) to convey to the jury the rule of law prescribed here as applicable to the case.

There is a very broad line of distinction, both in morals and law, between the conduct of one who gets property into his possession with a preconceived design never to pay for it, under color of a formal sale induced by a sham promise to pay which the party never intends to comply with, and the conduct of a man deeply involved in debt, far perhaps beyond his means of payment, and who, struggling it may be, and frequently is, against all rational hope, to sustain his credit and maintain his position in business, buys property to-day, under a promise (which he can hardly hope and most probably does not intend to keep) to pay for it on short time, in order to raise money from day to day to meet immediate and more pressing demands. Yet, under this instruction, the jury may well have supposed, and no doubt did suppose, that the law made no distinction, but visited both classes of cases with the same legal consequences. The difference between not intending to pay on the day fixed by the contract and intending never to pay—between getting property for nothing, under the mere color of a purchase, and getting it upon a longer credit than was agreed upon by the parties, but with an expectation ultimately to pay, is entirely lost sight of, or rather indeed, as it seems to us, the jury are in effect instructed that there is no difference, and that it is enough in this particular to avoid the sale as a fraudulent purchase, that the purchaser was unable to pay, "at the time agreed upon," and aware of his inability "in this respect," and did not intend to meet "his engagements" in point of time.

It was said before and is repeated now, that this is a question for a jury under proper instructions from the court. Although it may be improper in morals for one to buy property upon a promise to pay on a given day, when the party is conscious of his inability to meet his engagements at the time, and so may be said to buy with an intention not to meet his engagements, yet this is not, in point of law, such a sale as the vendor can avoid, and it was the duty of the court, in its directions to the jury, to have made the distinction in unmistakable language, and not to have employed general expressions, capable of being argued one way before the jury and another way before the court, and which the jury could construe to mean one thing or the other, according to the caprice of the moment, or

their own particular views of the conduct of the parties in other respects. * * *

DURESS.

Duress considered as a ground for avoiding a contract consists in any of the following acts committed or threatened by one of the parties, or with his connivance, and causing the other to enter into the contract.

1. Unlawful imprisonment of the other party.

2. Imprisonment of the other party procured through the abuse of lawful process or made unjustly oppressive.

3. Imprisonment of the husband or wife, parent or child, or other near relative of the other party.

4. Unlawful and great bodily harm to the other party or his near relative.

5. Unlawful seizure, detention or destruction of the property of such person.

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§ 60.—When a Ground for Avoiding a Contract.

BUSH v. BROWN.

1875. 49 Ind. 573.

DOWNEY, J.— * * * To give validity to a contract, the law requires the free assent of the party who is to become chargeable thereon; and it therefore avoids any promise extorted from him by terror or violence, whether on the part of the person to whom the promise or obligation is made, or on that of his agent. Contracts made under such circumstances are said to be made under duress. 1 Chitty Cont. (11th Amer. ed.) 269.

Duress is of two kinds; duress of imprisonment, where a man actually loses his liberty; and duress *per minas*, where the hardship is only threatened and impending. 1 Bl. Com. 131. Either kind of duress, while it does not render the contract absolutely void, will yet enable the party so under duress to avoid it at his option. The party practising the duress cannot take advantage of it. The imprisonment may be in a common prison, or it may be elsewhere. It appears to have been the rule that the imprisonment must have been unlawful, or, if lawful, undue force must have been used, or the party made to endure unnecessary privation, such as want of food, or the like, and he must have entered into the contract to obtain his liberty or to avoid such illegal hardship or privation. The mere fact of imprison-

ment was not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party was in proper custody under the regular process of a court of competent jurisdiction. * * *

LINE, ADMINISTRATRIX, v. BLIZZARD ET UX.

1880. 70 Ind. 23.

SCOTT, J.— * * * The errors assigned are the overruling of the demurrer to the answer, and the overruling of the motion for a new trial. The answer was as follows:

"Comes now Margaret E. Blizzard, one of the defendants in the above entitled cause, and for her separate answer to plaintiff's complaint herein, says, that she admits the execution of the notes and mortgage sued on in plaintiff's complaint, but says that said notes were given for the separate debt of her husband; that, at the time of the execution of said mortgage, she was a married woman, the wife of her codefendant, John W. Blizzard; that she still is his wife and residing with him; that the execution of said notes and mortgage aforesaid was not her free and voluntary act and deed; that Line, Poundstone & Co., to whom said notes and mortgage were executed, fraudulently and corruptly aided by her codefendant, John W. Blizzard, to procure defendant to sign said notes and mortgage; the said payees and said John W. Blizzard labored for three months to persuade this defendant to sign said notes and mortgage; that, notwithstanding all their persuasions and entreaties, this defendant steadily refused to execute said notes and mortgage as aforesaid; that the real estate described in said mortgage is this defendant's separate property; that the decedent, whom the plaintiff represents in her fiduciary capacity, well knew all these facts at the time he procured the assignment of these notes and mortgage to himself from Line, Poundstone & Co. And she further avers that her husband and codefendant caused this defendant to sign and execute the mortgage by threatening to abandon her with three small children, if she did not execute said notes and mortgage, and destroy her peace and happiness; that he continually kept up these threats until she yielded, as aforesaid; that the said Fergus A. Line, deceased, as aforesaid, well knew these facts at the time he so procured said assignment as aforesaid. Wherefore," etc.

"Any agreement made under improper pressure is voidable." Add. Con. 314. The threat of a husband to abandon his wife if she does not execute a mortgage on her separate real estate to secure his debt is an improper pressure; and a mortgage executed by a wife, under such a threat, may be avoided by her, if the threat induced the

execution of the mortgage, and was made with the knowledge and consent of the mortgagee, or if the mortgagee knew at the time of the execution of the mortgage that such mortgage was executed by reason of such threat of the husband. There is no allegation in the answer, showing that Line, Poundstone & Co. in any way participated in the duress complained of, or that they knew of any such threat having been made, to induce the appellee Margaret to execute such mortgage.

We are of opinion that the answer was insufficient, and the demurrer should have been sustained.

ELY v. HARTFORD LIFE INS. CO.

1908. 128 Ky. 799, 110 S. W. 265.

SETTLE, J.—* * * If, it be conceded that the conduct and threats of appellant's husband were such as to constitute duress, in the absence of proof sufficient to connect the carriage company with or show its knowledge of it, such duress would not affect the validity of the assignment of the policy to it. Duress to avoid a contract must be the act of the other party himself or his agent, or must be imposed with his knowledge and taken advantage of by him for the purpose of obtaining the agreement. Duress by a third person will not avoid a contract made with a party who was not cognizant of it. In Long, etc., v. Branham, 99 S. W. 271, 30 Ky. L. 552, there was an attempt to set aside a mortgage, one of the grounds being that the wife had executed it under duress, produced by the acts of her husband, aided by the conduct of the grantee. In respect to this complaint the court said: "While the evidence is conflicting, we are not disposed to disagree with the conclusion of the lower court that the weight of it is against appellant's contention that Mrs. Long executed the mortgage under duress, unless it was such as proceeded from the husband alone. That in signing or acknowledging the mortgage she acted with great reluctance we are satisfied, but the excitement and distress under which she labored at the time were apparently produced by the influence upon her by him. It was the conduct of the husband, or what he said to her in the conversation between them, after the mortgage had been written and before she acknowledged it, that gave her distress and caused her to weep." Fightmaster v. Levi, 17 S. W. 195, 13 Ky. L. 412; Hall v. Hall, 118 Ky. 656, 82 S. W. 269. * * *

DUNHAM v. GRISWOLD.

1885. 100 N. Y. 224, 3 N. E. 76.

EARL, J.— * * * The defendant further claims that he made the adjustment and promise and signed the agreement to pay the plaintiff under duress, and hence that he is not bound by the agreement. The facts as to the duress depend entirely upon the evidence of the defendant, and it was for the trial court, under all the circumstances of the case, to determine to what extent such evidence was entitled to credence. Upon the evidence it was a question of fact whether the agreement was executed in consequence of any duress whatever. The court could have found, and we may assume did find, that the only threats used, if any, were to arrest the defendant in a civil action for the wrong which he had done the plaintiff. The negotiations for the settlement were pending several days. The defendant was not under arrest or restrained of his liberty in any way. He appears to have been a business man, in the full possession of his faculties, and the plaintiff was an old man, his uncle. A mere threat to sue the defendant and to arrest him in such suit, or by virtue of an execution which could be issued upon a judgment obtained therein, would not be such a duress as would avoid a promise induced by such a threat. 1 Pars. Cont. (5th ed.) 393; Shephard v. Watrous, 3 Caines (N. Y.) 166; Farmer v. Walter, 2 Edw. Ch. (N. Y.) 601; Knapp v. Hyde, 60 Barb. (N. Y.) 80. When there is no arrest, no imprisonment, no actual force, and it is claimed that a promise was obtained by duress *per minas*, then whether or not the promise was obtained by duress must usually be a question of fact, and the question cannot be determined as one of law. It is not sufficient in such a case to satisfy the trial court that the threats were uttered; but it must also be shown that they constrained the will of the promisor, and induced the promise. * * *

Mere angry words, vexation and annoyance do not constitute duress. Adams v. Stringer, 78 Ind. 175; Brower v. Callender, 105 Ill. 88; Hagan v. Walde, 168 Ill. 646, 48 N. E. 89; Gabbey v. Foregeus, 38 Kan. 62, 15 Pac. 866.

Nor do impotent or idle threats. Miller v. Miller, 68 Pa. St. 486, 493; Van Derventer v. Van Derventer, 46 N. J. L. 462; Rendleman v. Rendleman, 156 Ill. 568, 572, 41 N. E. 223.

Nor do persistent endeavors or any amount of persuasion to influence one to exercise his own will to some particular end. Hamilton v. Smith, 57 Iowa 15, 10 N. W. 276; Parker v. Lancaster, 84 Me. 512, 24 Atl. 952; Batavian Bank v. North, 114 Wis. 637, 90 N. W. 1016.

GALUSHA ET UX. v. SHERMAN ET AL.

1900. 105 Wis. 263, 81 N. W. 495.

MARSHALL, J.— * * * Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See 1 Chit. Cont. (11th ed.), p. 272; 2 Greenl. Ev. 301. But the ancient theory that duress was a matter of law to be determined *prima facie* by the existence or non-existence of some circumstance deemed in law sufficient to deprive the alleged wronged person of freedom of will power, was adhered to generally, the standard of resisting power, however, being changed so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb, came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. The learned counsel for appellants have referred to some such authorities to support their claim that the finding under discussion is contrary to law, in that the threats made to respondent, assuming his evidence to be true, were not sufficient to deprive a person of ordinary firmness of his free will power. From that it is argued that the finding is unwarranted.

That one should be led astray on the question of there being a legal standard of resisting power, by which the sufficiency of the oppressive conduct claimed to have produced duress in a given case must be tested, is most natural in view of the number and character of the authorities to that effect. As we have seen, the text of Chitty and of Greenleaf both so clearly indicate. In U. S. v. Huckabee, 16 Wall. (U. S.) 414, a case generally cited as giving a very clear definition of duress according to the modern doctrine on the subject, Mr. Justice Clifford said: "Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness." On the same line, Mr. Justice Colerick, in Hines v. Board, 93 Ind. 266, said, citing from 4 Wait, Act. & Def., p. 490: "Mere threats of violence, or of prosecution, are not enough to constitute duress. There must be a reasonable ground for creating an apprehension that threats will be carried into execu-

tion, in the mind of a man of ordinary firmness and courage, and must operate upon him directly, so as to overcome his will." Similar language is used in legal opinions of courts of many of the states, as will be shown by reference to the following: Youngs v. Simm, 41 Ill. App. 28; Harmon v. Harmon, 61 Me. 227; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, and 29 N. E. 525; Higgins v. Brown, 78 Me. 473, 5 Atl. 269; Wolfe v. Marshall, 52 Mo. 167; Burr v. Burton, 18 Ark. 214; Flanigan v. City of Minneapolis, 36 Minn. 406, 31 N. W. 359; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321. In the last case cited the following instruction to the jury was approved: "The threats, if any were in fact made, must have been of such a character as to naturally overcome the mind and will of a person of ordinary firmness, and deprive him, for the time being, of the power of mind and will to resist the demand by the person making such threats." Those authorities indicate adherence to the doctrine of a legal standard of resistance by which to test the alleged wrongful acts; also adherence, generally, to the old doctrine of the legal sufficiency of particular threats or acts to produce duress, the only change in the former element, from the ancient common law, being the substitution of resisting power of a person of ordinary firmness for that of a prudent and constant man; and the only change in the latter element being the addition of elements of less severity than actual imprisonment or danger of loss of life or limb, as being sufficient to deprive a person, of the legal standard of resisting power, of his free will, leaving the only question of fact to be determined by the jury, whether the will power of the oppressed person was in fact overcome in the particular case, the presumption, in the absence of evidence to the contrary, being in the affirmative.

It will be noted in an examination of the cases that the means used to overcome the person threatened are uniformly referred to as the duress, instead of the condition of mind produced thereby. In U. S. v. Huckabee, *supra,* it is said: "Decisions of high authority adopt the liberal rule that contracts procured by threats of battery to the person, or of distraint of property, may be avoided by proof of such facts." In Harmon v. Harmon, *supra,* it is said that mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment. Similar language is found in Hilborn v. Buckman, 78 Me. 485, 7 Atl. 272, and Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718. In Knapp v. Hyde, 60 Barb. 80, it was held, following the old common-law doctrine, that in order to avoid an act on the ground of menace of arrest or imprisonment, it must appear that the menace was of unlawful imprisonment; while in Insurance Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651, it is said that the guilt or innocence of the alleged wronged party, or the lawfulness or unlawfulness of the threats, are immaterial, the material and only material question being, was the threat

made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?

Sufficient has been said to show the conflict that exists on the subject under discussion. The more advanced doctrine is that stated in the Alabama case cited. Under it, advantages obtained by what was considered duress by old common-law rules, or such rules as changed, in respect to the standard of resisting power which the threatened person is legally bound to exercise for his own protection or be remediless at law for the consequences, and in respect to the nature of the threats deemed legally sufficient to overcome a person of the legal standard of resisting power, and also advantages wrongfully obtained, though not by duress in law, and remediable as such, but remediable in equity upon the ground of unjust compulsion, are now practically in one class. Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such conditions was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the

result an inference of law. It is a mistaken idea that what constitutes duress is different in case of an aged person or a wife or child than in case of a man of ordinary firmness. As said in Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, the condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex and mental characteristics of the alleged injured party, are all evidentiary, merely of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress. The more modern text writers so state the law to be.

In Bishop on Contracts (719) it is said, in substance, that the proposition found in many of the cases that the threat must be such as would excite the reasonable apprehension of a person of ordinary courage, is certainly incorrect; that it originated in the failure of the old writers (referring to Coke on Littleton) to distinguish between the mind acted upon and the thing menaced; that the law of contracts considers the quality of the contracting mind, and therefore holds the apparent, not real, consent of the subject or timid person, or person of inferior intellect, as invalid as that of the strongest and most independent understanding, though the latter would not have been enthralled where the former was. In the last revisions of Chitty on Contracts, brought out in 1890 and 1896 (page 199 of the latter), the old text on the subject under discussion was changed to conform to the doctrine as stated in Bishop on Contracts. * * *

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§ 60 (1)—Unlawful Imprisonment.

MEACHAM v. TOWN OF NEWPORT.

1897. 70 Vt. 67, 39 Atl. 631.

ASSUMPSIT by S. D. Meacham against the town of Newport.

Evidence went to show only that Meacham was arrested and committed to the county jail by Lindsay, the town collector of taxes, and there remained two or three days, when he paid the jailer, under protest, the amount claimed by Lindsay to be due upon a warrant, and was released, and a part of the money thus paid was paid by Lindsay to the town treasurer of defendant.

At the conclusion of the plaintiff's case both parties rested. No

question was made as to the truth of the evidence. The defendant moved for a verdict, but the motion was overruled, and a verdict ordered for the plaintiff for the amount paid by Lindsay, the constable, to the defendant's treasurer.

Judgment for plaintiff. Defendant excepts.

START, J.— * * * When a party seeks to avoid a contract because of duress by imprisonment, it is not enough to simply show that he was imprisoned. He must go further, and show that the imprisonment was unlawful; or, if lawful, that, while imprisoned, he was subjected to undue force or unnecessary privation, and that to obtain his liberty, or to avoid such illegal hardship or privation, he was induced to make the contract. Chit. Cont. 217; 6 Am. & Eng. Enc. Law 96; Heaps v. Dunham, 95 Ill. 583; Hatter's Ex'rs v. Greenlee, 1 Port. (Ala.) 222; Eddy v. Herrin, 17 Me. 338; Clark v. Turnbull, 47 N. J. Law 265; Mascole v. Montesanto, 61 Conn. 50, 23 Atl. 714; Stouffer v. Latshaw, 2 Watts (Pa.) 167. The plea of duress of imprisonment is not supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument. If the imprisonment was lawful,—that is, if it was by legal process,—the plea is not supported, unless it appear that the arrest was upon process sued out maliciously and without probable cause, or that, while the party was under lawful arrest, unlawful force, constraint, or severity was inflicted upon him, by reason of which the instrument was executed. 2 Greenl. Ev., § 302. To constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful. Watkins v. Baird, 6 Mass. 510. There must be actual and unlawful imprisonment to constitute duress, and the deed given as a consideration for the discharge. Moore v. Adams, 8 Ohio 372. Imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party is in proper custody, under legal process of a court of competent jurisdiction. Broom Leg. Max. 131. To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it, and, in the absence of proof to the contrary, an arrest must be taken as justifiable. Stouffer v. Latshaw, 2 Watts (Pa.) 165.

Judgment reversed.

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§ 60 (2)—Abuse of Lawful Process.

FILLMAN v. RYON.

1895. 168 Pa. St. 484, 32 Atl. 89.

MCCOLLUM, J.— * * * There was probable cause for the arrest of the plaintiff for the crime with which he was charged in the information, and the warrant for it was regular upon its face. The arrest, therefore, considered by itself, afforded no ground for

an action for malicious prosecution. This much was conceded by the learned referee, who nevertheless found that the arrest was made for the purpose of extortion, and that the money obtained by it was paid under duress. As these findings appear to be warranted by the evidence, the case must be disposed of upon them. To constitute duress by imprisonment, the latter must be unlawful, or there must be an abuse of or an oppression under lawful process or legal detention. 6 Am. & Eng. Enc. Law, p. 62, and cases there cited. If there is an arrest for a just cause, but for an unlawful purpose, the party arrested, if he is thereby induced to enter into a contract, may avoid it as one procured by duress. Baker v. Morton, 12 Wall. (U. S.) 150. "Though a person is arrested under a legal warrant, and by a proper officer, yet if one of the objects of the arrest is thereby to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same, or participated therein for any such purpose, and a release or conveyance of property obtained by means of such arrest is void." Hackett v. King, 6 Allen (Mass.) 58. The principles enunciated in the citations made are in accord with the decisions of this court. Prough v. Entriken, 11 Pa. St. 85; Schofield v. Ferrers, 47 Pa. St. 194; Schmidt v. Weidman, 63 Pa. St. 173; Mayer v. Walter, 64 Pa. St. 285; and Work's Appeal, 59 Pa. St. 445. The law does not countenance the employment of criminal process for the collection of debts and the enforcement of civil liabilities. If there is probable cause for a criminal prosecution, and it is instituted and maintained for a lawful purpose, the acquittal of the accused does not give him an action against the prosecutor. But if there is just cause for the prosecution, and it is resorted to for an unlawful purpose, the prosecutor will not be permitted to acquire anything by it. These well-settled principles are applicable to the facts found by the learned referee in the case at bar. The plaintiff was arrested on the charge of embezzlement, and for the purpose of extorting money from him. The prosecution was abandoned when the purpose of it was accomplished. He parted with his property while under duress by imprisonment and threats, and his right to recover it from the wrongdoer cannot, under the circumstances shown, be successfully questioned. * * *

MORRILL v. NIGHTINGALE.

1892. 93 Cal. 452, 28 Pac. 1068.

GAROUTTE, J.— * * * The findings show that the warrant of arrest was secured in bad faith, and for purposes not countenanced in law. It was secured solely to be used as a menace for the collection of an indebtedness, and it was ever accompanied with the

threat that, if such indebtedness was not satisfied, the warrant would be executed, and imprisonment follow. Such a proceeding is an abuse of criminal process, and impedes the due course of public justice.

In the case of Bane v. Detrick, 52 Ill. 27, the court said: "The mortgage was void for another reason: It was executed through a perversion and abuse of criminal process. It is proved that Bane got out this process, and used it to effect a settlement of a claim which there is much evidence to show was unfounded. It is against public policy that process should be thus used, and no court will allow the results flowing from it to be enjoyed by him who so uses it. It is a gross abuse of legal process, and no person should have the aid of a court of justice to profit by it." Under that kind of menace which consists in a threat of injury to the character of a person, it is entirely immaterial whether such person is guilty or innocent of the crime to be charged. It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or falsity of these matters form no element in establishing the guilt or innocence of a defendant charged with extortion. In Hackett v. King, 6 Allen (Mass.) 58, it was decided that, though a person was arrested under a legal warrant, and by a proper officer, yet, if one of the objects of the arrest was to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment, by all who have directly or indirectly procured the same or participated therein for any such purposes; and a release and conveyance of property, obtained by means of such arrest, is void. In Taylor v. Jaques, 106 Mass. 294, the court, in speaking of a certain instruction given by the lower court, said: "We do not concur with that view of the law. If he had embezzled their funds, they had a right to have him prosecuted. If he owed them a debt, they had a right to accept security for it. But they would have no right to make use of a criminal process for the collection of a debt. An arrest, even upon a legal warrant, and upon a criminal charge, to compel the payment of a mere debt, would be a misuse of legal process; and the threat of such an arrest may constitute unlawful duress." In Richardson v. Duncan, 3 N. H. 511, the court said: "But it is now well settled that when there is an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause, but without lawful authority, or where there is an arrest for a just cause and under lawful authority for unlawful purposes, it may be construed a duress." It will thus be seen that an imprisonment for an unlawful purpose will constitute duress, and, such being the fact, a threat of arrest and imprisonment, made for unlawful purposes, will constitute menace. * * *

BEHL v. SCHUETT ET AL.

1899. 104 Wis. 76, 80 N. W. 73.

THIS was an action on a promissory note signed by the defendants, Theodore Schuett and William Christian, payable to the order of the plaintiff. The defense was that the note was obtained by the plaintiff by means of duress of imprisonment. Verdict for the defendants. Appeal.

WINSLOW, J.—The only errors claimed relate to the charge of the court. These will be considered.

The court stated to the jury the claims of the defendants in the following terms: "They claim, among other things, that the plaintiff and his wife—that is, Mr. Behl and his wife—brought an action in 1893 against the defendant William Christian for malicious prosecution, laying their damages in that action at the sum of $20,000; that they procured a warrant of arrest in that action from a court commissioner of Milwaukee county for the arrest of William Christian, with directions to hold him to bail in the sum of $10,000; that such warrant was placed in the hands of the sheriff of Dodge county, where Mr. Christian resides, with instructions to arrest and take him to the city of Milwaukee by early morning train on February 23, 1893; that the sheriff did arrest him at 3 o'clock in the morning of that date, and took him to the city of Milwaukee by early train, where it was more difficult for him to consult or communicate with his friends and to obtain bail than it would have been if he were at home; that at Milwaukee he was at once taken to the office of the plaintiff's attorney in that action, and there had an interview with the plaintiff and his attorney. Mr. Christian claims that in that interview the plaintiff, or his attorney, or both, refused to accept sufficient bail which he offered, and refused to give him an opportunity to get other bail, but that they insisted that he must settle or go to jail; that he was thus made to believe that he must settle in order to avoid going to jail, and that therefore, and so believing, he did settle, and gave the note in suit. The plaintiff claims that the note was given voluntarily by Mr. Christian and Mr. Schuett, without any fraud or duress, and for the purpose of settling or compromising the action which was then pending against the defendant Christian." This seems to be a substantially fair statement of the defendants' claims, but it is said that it might be misleading, because the jury might consider it as a statement of facts proven, rather than simply of claims made. This position, however, is not tenable, because the court distinctly told the jury that the defendants "claim" these to be the facts. Exceptions were taken specially to that part of the foregoing instruction which says that the defendants claim that the plaintiff and his attorney refused sufficient bail which was offered,

and refused to give the main defendant an opportunity to get bail, because it is said that there is no evidence that sufficient bail was offered. The evidence of the defendant Schuett, however, is to the effect that he offered to sign the bond himself, and offered to procure another signer, either by telegraph or going to Watertown, but that the plaintiff's attorney refused to wait, and told them that bonds must be given at once, or that Christian must go to jail or settle. This evidence seems to justify the instruction.

Error is also claimed because the court told the jury, in substance, that if Behl was prosecuting the former action in good faith, and Christian compromised it by giving the note without fraud or undue advantage being taken of him, then the defendants are liable. It is said that there was no question as to the good faith of the former action in the case. In this position the appellant is clearly in error. The principal question in the case was whether Behl was prosecuting the former action in good faith to collect damages, or whether he had brought it and secured Christian's arrest in bad faith, and simply in order to coerce a settlement regardless of the fact whether he had any good cause of action or not. If such was his purpose then the process of the court was abused, even though the process was valid on its face; and a settlement so induced will be vitiated by the duress if the evidence shows that the duress was reasonably adequate to overcome the will of the defendants, and did overcome it. Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473. * * *

Judgment affirmed.

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§ 60 (3)—Imprisonment Made Unjustly Oppressive.

SCHOMMER v. FARWELL ET AL.

1869. 56 Ill. 542.

LAWRENCE, J.—This was a bill in chancery, filed by Leonard Schommer against John V. and Charles B. Farwell, to set aside a mortgage given by complainant to them under the following circumstances: It appears that the Farwells employed a son of Schommer, a youth of sixteen, to keep an account of the loads of sand taken from a piece of land near Chicago, belonging to them, and to collect the money for each load. They became suspicious that the boy was defrauding them by not making honest returns, and gave the matter in charge to one Keefe, a professional detective, in the employment of the Farwells. He investigated the matter, and becoming satisfied the boy was practicing a fraud, and doubtless supposing his father was privy to it, procured a warrant from a magistrate and had the father arrested.

The arrest was made in the evening, about the last of October, 1867. Schommer was at once taken to jail, and placed in a cell without fire or a bed, where, as he testifies, he suffered greatly from cold during the night, being at the time in feeble health. In the morning he was taken from the cell up-stairs, where he was confronted with Keefe, who charged him with being engaged, with his boy, in embezzling the money for the sand to a large amount, and, according to Keefe's own testimony, offered to have the prosecution stopped if Schommer would pay over the money. Schommer denied the charge and Keefe went away. Schommer was put back in the cell. About noon Keefe appeared again at the police station, and Schommer was again brought from his cell to meet him. Another conversation ensued, the result of which was that Schommer agreed to pay the Farwells $300 in money, and give a mortgage on his property, for $900, if he could be released. An officer was then sent with him to his house, and, the money having been paid and the mortgage executed, he was released from custody. Keefe testifies Schommer, in the second conversation, admitted the embezzlement by him of $1,200, and that he owed the Farwells that amount. The bill, in this case, is filed for the purpose of canceling the mortgage, and recovering back the money paid.

It is quite true, as urged by counsel for appellees, that a person prosecuting upon a charge of crime may receive private satisfaction for his private injury, and the fact that he receives this while the prisoner is in confinement, and forbears further prosecution, does not, of itself, render the transaction illegal. This was so held in Taylor v. Cottrell, 16 Ill. 93. But as was said by Parsons, C. J., in Watkins v. Baird, 6 Mass. 506, even if the imprisonment is lawful, yet if the prosecutor detain the prisoner in prison unlawfully, by covin with the jailor, this is a duress which will avoid a deed. There can be no doubt of the correctness of this principle, and it is applicable to the case at bar. Schommer swears he was told, while in confinement, that he could have neither lawyer nor trial, but must pay his debts. His testimony is, of course, to be received with caution, but Keefe himself testifies Schommer said he wanted to be tried, and was willing to go down and have his trial. There is no pretense that his examination before the magistrate who issued the warrant was delayed for the purpose of procuring testimony. Keefe himself was the witness on whose evidence the prosecution would have rested. When, therefore, Schommer demanded to be taken before the magistrate he should have been taken there. Instead of this the jailor, after the first ineffectual interview between Schommer and Keefe, recommits Schommer to his cell until Keefe again appears, and Schommer, under the apprehension of further incarceration, accedes to Keefe's demands. He is then discharged without having been taken before the magistrate who issued the warrant at all.

It is evident that the sole purpose of Keefe in this prosecution was, by the agencies of the criminal law, to secure what he believed to be a debt due to his employers. The police officers seem to have paid no attention to the command of the magistrate's warrant, or to the rights of the prisoner, but to have used their official power merely in obedience to the wishes of Keefe, and to enable him to accomplish his private purpose. We presume Keefe believed Schommer's son had been guilty of embezzlement, and that the father was privy to it, but this did not justify him in prolonging the imprisonment of Schommer a single hour, merely for the purpose of compelling the execution of this mortgage, and if it was executed by Schommer as the only means of speedily terminating his confinement, and after being refused a hearing before the magistrate, then it was executed under duress and is void. That it was so executed is fairly to be inferred from the testimony.

The majority of the court are of opinion the complainant is entitled to have the mortgage canceled and the money paid refunded with interest, and the superior court will make a decree to this effect. The decree is reversed and the cause remanded.

Decree reversed.

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§ 60 (4)—Imprisonment of Husband or Wife, Parent or Child.

ADAMS v. IRVING NAT. BANK.

1889. 116 N. Y. 606, 23 N. E. 7.

BROWN, J.— * * * The rule is firmly established that, in relation to husband and wife or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment. Eadie v. Slimmon, 26 N. Y. 9, is a leading authority on this question. In that case an assignment of a life insurance policy was obtained by threats to prosecute the plaintiff's husband criminally for embezzlement. The husband whose life was insured having died, the action was brought to determine the ownership of the money due from the insurance company. Judge Smith, who delivered the opinion of the court, says: "The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism, and coercion which overcame free agency; in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint. * * * A deed executed at such a time, under such circumstances, should be deemed obtained by un-

due influence, and ought not to stand." Five judges appear to have concurred in the part of the opinion quoted. Judge Denio concurred on the ground that the policy was not assignable, and Judge Wright dissented. The case was cited as an example of duress of person in Peyser v. Mayor, etc., 70 N. Y. 501, and as an authority for avoiding a note obtained by duress in Osborn v. Robbins, 36 N. Y. 371. It has frequently been cited in the supreme court (Fisher v. Bishop, 36 Hun (N. Y.) 114; Haynes v. Rudd, 30 Hun (N. Y.) 237; Ingersoll v. Roe, 65 Barb. (N. Y.) 357; Schoener v. Lissauer, 36 Hun (N. Y.) 102), and in other states, and in the text-books, and has thus become a leading authority upon the question under discussion. It is nowhere suggested in that case, either in the facts or in the opinion, that it was necessary, to sustain the judgment in favor of the plaintiff, that the threat must have been of an unlawful or illegal arrest. For all that appears, the husband was guilty of the charge made, and on that assumption it is peculiarly like the case at bar. Other authorities sustain the same principle. In Haynes v. Rudd, 30 Hun (N. Y.) 237, it was said: "We think that when threats of a lawful prosecution are purposely resorted to for the purpose of overcoming the will of the party threatened by intimidating or terrifying him, they amount to such duress or pressure as will avoid a contract thereby obtained." This statement of the law was not disturbed by this court, the reversal being put on other grounds. In Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741, a bond and mortgage was obtained from the mortgagor by the threat that, unless it was given, his son, who was charged with embezzlement, would go to state's prison. The mortgage was set aside, and this court sustained the judgment. After stating the facts, it was said by Judge Rapallo: "On the merits this judgment is sustained by Bayley v. Williams, 4 Giff. 638, affirmed L. R. 1 H. L. 200, and Davies v. Insurance Co., L. R. 8 Ch. Div. 469." The first case cited by Judge Rapallo fully sustains the recovery in the case at bar. In Harris v. Carmody, 131 Mass. 51, a mortgage was obtained from a father on the threat that his son, who was charged with forging his father's name to notes held by the plaintiff, would be sent to the state's prison. It was held that the father could avoid the mortgage on the ground that it was made to relieve the son from duress. See also, Taylor v. Jaques, 106 Mass. 291. In none of the cases cited was it suggested that the threat which induced the making of the contract was of an illegal prosecution, or an unlawful arrest, and in most of them it appears that the person charged with an offense was guilty. The principle which appears to underlie all of this class of cases is that, whenever a party is so situated as to exercise a controlling influence over the will, conduct, and interest of another, contracts thus made will be set aside. 1 Story Eq. Jur., §§ 239-251; 2 Pom. Eq. Jur., §§ 942, 943; Lomerson v. Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Ingersoll v. Roe, 65 Barb. (N. Y.) 346; Fisher v.

Bishop, 36 Hun (N. Y.) 112, 108 N. Y. 25, 15 N. E. 331; Barry v. Society, 59 N. Y. 587. In the last case cited it was said: "Where there exists coercion, threats, compulsion, and undue influence, there is no volition. There is no intention or purpose but to yield to moral pressure, for relief from it. A case is presented more analogous to a parting with property by robbery. No title is made through a possession thus acquired." It was not error, therefore, for the court to deny the motion to dismiss the complaint on the ground that there was no evidence that the money was paid under duress. Upon the evidence it was a question of fact whether the agreement was executed and the money paid in consequence of threats and undue influence. Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76. If the money was paid by the plaintiff through fear produced by Mr. Castre's representations that, if the claim was not settled, her husband would be arrested and imprisoned, the payment was not a voluntary one, and the defendant obtained no title to the money received. This question was settled in plaintiff's favor by the verdict of the jury. * * *

WILLIAMSON-HALSELL, FRAZIER CO. v. ACKERMAN ET AL.

1908. 77 Kan. 502, 94 Pac. 807.

JOHNSTON, C. J.—* * * Many cases may be found in the books where the threatened prosecution of a child amounted to duress of the parent. An illustration may be found in Williams v. Bayley, L. R. 1 H. L. 200, 35 L. J. Ch. 717, where bankers had acquired paper forged by a young man, and who had brought pressure upon the father to assume the payment of his obligations. The Lord Chancellor spoke of the pressure brought upon the father as of this nature: " 'We have the means of prosecuting and so transporting your son. Do you choose to come to his help, and take upon yourself the amount of his debts—the amount of his forgeries? If you do, we will not prosecute. If you do not, we will.' That is the plain interpretation of what passed. Is it, or is it not, legal? In my opinion, my lords, I am bound to go the length of saying that I do not think it is legal." Lord Westbury, in concurring in the judgment, said: "The question, therefore, my lords, is whether a father appealed to under such circumstances to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of a conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe,

who takes a security for the debt of a felon, from the father of a felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract which should be based upon the free and voluntary agency of the individual who enters into it." See, also, City National Bank of Dayton v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. 880, and note.

ROBINSON v. GOULD.

1853. 11 Cush. (Mass.) 55.

BIGELOW, J.—The general rule of law is well established, on reasons of justice and sound policy, that contracts, in order to be valid and binding, must be the result of the free assent of the parties. Therefore duress, either of actual imprisonment or *per minas*, constitutes a good defense to an action on a contract in behalf of those from whom contracts have been thus extorted. Duress by menaces, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, inducing a reasonable fear of loss of liberty. 2 Rol. Ab. 124; 2 Inst. 482-3; Bac. Ab. Duress (A); 20 Amer. Jur. 24; Chit. on Cont. 168. It is also well settled that the duress which will avoid a contract, must be offered to the party who seeks to take advantage of it. This was early adjudged in Mantel v. Gibbs, 1 Brownlow 64, where, to an action of debt, brought on an obligation, the defendant pleaded that a stranger was imprisoned until the defendant, as surety for the stranger, made the bond. This was held a bad plea. The same principle is laid down in Hanscombe v. Standing, Cro. Jac. 187, where it was held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only, and although the bond be avoidable as to the one, yet it is good as to the other. Wayne v. Sands, 1 Freeman 351; Shep. Touch. 62; McClintick v. Cummins, 3 M'Lean (U. S.) 158; 20 Amer. Jur. 26.

And certainly this distinction rests on sound principle. He only should be allowed to avoid his contract, upon whom the unlawful restraint or fear has operated. The contract of a surety, if his own free act, and executed without coercion or illegal menace, should be held binding. The duress of his principal cannot affect his free agency or in any way control his action. It may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence toward his neighbor; but these can furnish no valid ground of defense against his contract, which he has entered into freely and without coercion.

The case at bar falls very clearly within this principle. The de-

fendant was put under no restraint; no threats were made to him. His principal may have been coerced to apply to the defendant to be his surety, but there is nothing in the case which tends to show any duress toward the defendant. * * *

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§ 60 (5)—Great Bodily Harm.

BAKER v. MORTON.

1871. 12 Wall. (U. S.) 150.

CLIFFORD, J.— * * * Complete incipient title was acquired by the complainant under the preemption laws of the United States, and on the same day the defaulted respondent, through threats to take his life if he refused, compelled him to convey the same to that party, and the settled law of this court is that such acts amount to legal duress, and that a deed, or other written obligation or contract, procured by such means, is inoperative and void, and that rule is applied in all jurisdictions where the principles of the common law prevail. Pierce v. Brown, 7 Wal. (U. S.) 205, 214.

Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent. Chit. Cont. 192; 2 Greenl. Ev. 283; 2 Inst. 482; 2 Roll. Abr. 124; Richardson v. Duncan, 3 N. H. 508; Watkins v. Baird, 6 Mass. 511.

Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose; and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress. * * *

REMINGTON v. WRIGHT.

1881. 43 N. J. L. 451.

THE CHANCELLOR.—The plaintiff in error signed, with her husband, and as surety for him, in Illinois, two promissory notes, payable to the order of Kent & Keith, which were delivered to that firm, and by it endorsed to the defendant in error, after maturity. Under the law of that state, the contracts were enforceable against her. Suit was brought against her thereon here, and she sets up two defenses—one, that she signed the notes under duress of her husband's threat of suicide, and the other, that when she signed them, the payees promised that she should not be called upon to pay them. The supreme court held—and I think rightly—that both of these defenses were unavailable. By the common law, the defense of duress, indeed, embraces threats of personal injury to husband, wife, parent or child, but its scope does not include a threat of suicide. Obviously, in view of the facility of making a defense on that ground, the difficulty of meeting it, and the temptation to fraudulent imposition it would hold out to allow it, it would be against public policy to extend the defense to that kind of pressure.

As to the other defense, it is enough to say, that to admit proof of a parol contemporaneous promise, on the part of the payees, that the wife should not be called upon to pay the notes, would be in violation of the familiar rule of evidence which excludes parol evidence to contradict the terms of written instruments.

The judgment of the supreme court should be affirmed.

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§ 60 (6)—Duress of Property.

FORBES v. APPLETON.

1849. 5 Cush. (Mass.) 115.

THIS was an action of assumpsit brought by the plaintiff to recover back a sum of money paid by him to the defendant, the obligee in a bottomry bond, to prevent the obligee from inforcing the same, by taking possession of the vessel.

DEWEY, J.— * * * The principle of law is a very familiar and a very salutary one, that where a person, with full knowledge of all the circumstances, pays money voluntarily, under a claim of right, he shall not afterwards recover back the money so paid. To avoid the application of the rule in the present case, it must appear, that the plaintiff was compelled by duress of his person or goods to pay

the same. In general, the cases that have been treated as exceptions are cases where the possession of the property, upon which the lien was claimed, was already in the party demanding the money, or cases in which the party had no other means to save himself from imprisonment, or his property from sale on execution or warrant of distress, but by paying the money demanded. Many cases bearing upon this point will be found cited and commented upon in the cases of Preston v. Boston, 12 Pick. (Mass.) 7, and Boston & Sandwich Glass Co. v. Boston, 4 Met. (Mass.) 181.

The present case, looking at the facts agreed, seems to present nothing beyond the ordinary case of a voluntary payment of money to avoid a law suit. The party demanding the money had not the actual possession of the vessel, which was the subject of the bottomry bond, and could not proceed forthwith to levy upon the same, by means of any process in the nature of an execution or warrant of distress.

The proceeding against the vessel, although a proceeding *in rem*, and authorizing a sequestration of the vessel, was yet one easily discharged, and which the present plaintiff had it in his power to have at once discharged, by making a deposit of money, or giving proper security to pay such demand and all costs, if the same should be duly established before the proper tribunal. A threatened law suit is not that species of duress, which will authorize the party to recover back money voluntarily paid on an illegal claim. Brown v. McKinally, 1 Esp. R. 279. We perceive nothing in the present case to distinguish it from the ordinary case of a payment of a controverted demand. The mere declaration of the party making the payment, that he does it under coercion, and with denial of the right of the other party to recover the same, will not avail. If he has a good defense to the claim, he should resist it in the outset. If he does not, he waives his right to litigate the matter further.

Judgment for the defendant.

BRADFORD v. THE CITY OF CHICAGO.

1861. 25 Ill. 411.

IN this case the plaintiff sued to recover back from the city a sum of money which he had paid under a void assessment. It was paid to the collector whilst a warrant was in his hands to be executed.

BREESE, J.— * * * On the authorities cited by the counsel for the city, we will endeavor to show, that this payment was so far compulsory, as to give to the plaintiff a right of action to recover it back.

The first case cited is Preston v. The City of Boston, 12 Pick. (Mass.) 7. * * *

The court say: When a party is compelled by duress of his person or goods to pay money for which he is not liable, it is not voluntary, but compulsory, and he may rescue himself from such duress by payment of the money, and afterward, on proof of the fact, recover it back, citing Astley v. Reynolds, 2 Strange 916. That case was where the plaintiff had pawned plate to the defendant, and coming to redeem it, the defendant demanded ten pounds for the interest of his loan of twenty pounds. The plaintiff tendered four pounds, which was more than legal interest, which was refused, and he then went away. Some months afterward, the plaintiff made a second tender of four pounds, which was again refused, the defendant still insisting upon ten pounds; the plaintiff paid it, had his goods and brought his action for the surplus beyond legal interest. It was argued that this payment was made voluntarily, and falls within the rule *volenti non fit injuria,* that he could have maintained trover for the plate. The court say, we think this is a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not; we must take it he paid the money relying on his legal remedy to get it back again. The court in Massachusetts proceeded to say: What shall constitute duress is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained, and try the question of liability at law. Threat of legal process is not such duress, for the party may plead and make proof and show that he is not liable. But the warrant to a collector, under our statute, for the assessment and collection of taxes, is in the nature of an execution running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. When therefore, a party, not liable to taxation, is called on peremptorily to pay upon such a warrant, and he can save himself and property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily; and by showing that he is not liable, recover it back as money had and received.

It may be said the court, in Preston v. Boston, lays stress upon the fact of the party paying having no other way to extricate his person or property, but that this plaintiff had another way, by refusing to pay and being returned as delinquent, and contesting the validity of the assessment before the court, when a judgment was prayed for on the collector's return. The answer to this is, that the collector might not, if the plaintiff had personal property, return him as delinquent, but seize and sell such property according to the exigency

of the warrant, in which event the law would give the plaintiff no relief, as he could not, under our statute, replevy his goods, they being taken for an assessment. (Ch. 88, Scates' Comp. 226.) He has no day in court—no opportunity to plead or make defense against the warrant. It clothes the officer with full power to seize and sell, and is in the nature of an execution.

In a later case, The Boston and Sandwich Glass Company v. City of Boston, 4 Metcalf (Mass.) 181, the court ruled in the same way, dispensing, however, with notice or protest. * * *

FARGUSSON v. WINSLOW.

1885. 34 Minn. 384, 25 N. W. 942.

DICKINSON, J.—The plaintiff chartered the steam-barge Egyptian, owned by the defendant, to transport a cargo of wheat from Duluth to Buffalo. There was no special agreement as to the time of delivering or receiving the cargo. The plaintiff was advised, on the twenty-ninth of September, that the vessel was ready to take in cargo, but, by reason, as the jury has determined, of other vessels then waiting at the elevators to be loaded, she did not receive her cargo until the vessels so preceding her had been loaded, which was not until the fifth of October. The plaintiff had grain in the elevators for delivery, and ordered it to be delivered. He had not, however, any control over the management of the elevators. This action relates to a claim of the defendant for demurrage on account of such detention. After the vessel arrived at Buffalo the cargo, consisting of more than 50,000 bushels of wheat, was detained, and a delivery refused until the plaintiff should pay a claimed demurrage of $200. To release the grain from such detention the plaintiff paid that sum under protest, and now prosecutes this action to recover back the money so paid.

It is not claimed here that the defendant was in fact entitled to the demurrage; and upon the exceptions taken to the charge of the court as given, and to the refusals to charge as requested, only the following questions are presented for decision: (1) Did the claim for demurrage, to which the claimant was not in fact entitled, although asserted in good faith, constitute a lien upon the cargo, and give a legal right to detain the same, until such claim should be adjusted or determined? (2) Is the payment of such claim, under protest, with knowledge of all the facts, and for the purpose of releasing the cargo from such detention, to be deemed a merely voluntary payment, or as one made under such circumstances of compulsion or duress that it may be recovered back? (3) Was the court

justified in taking from the jury the question as to whether the payment in question was made under duress, or was voluntary?

1. The first of these questions we answer in the negative. The law gives the lien as a security only where there is a legal right which may be enforced. If there is no such right, the lien, which is only an incident, cannot exist. The existence of a lien depends upon the fact that the defendant was entitled to demurrage, and not upon what he may have supposed to be his right.

2. When one, in order to recover possession of his personal property from another, who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back; at least when such detention is attended with circumstances of hardship or of serious inconvenience to the owner. Shaw v. Woodcock, 7 Barn. & C. 73; Parker v. Bristol & E. Ry. Co., 7 Eng. Law & Eq. 528; Elliott v. Swartwout, 10 Pet. (U. S.) 137; Cobb v. Charter, 32 Conn. 358; Chase v. Dwinal, 7 Greenl. (Me.) 134; Chamberlain v. Reed, 13 Me. 357; Schley v. Munford, 60 N. Y. 498; Briggs v. Boyd, 56 N. Y. 289; Beckwith v. Frisbie, 32 Vt. 559; Lafayette & I. R. Co. v. Pattison, 41 Ind. 312; Hackley v. Headley, 45 Mich. 569; s. c. 8 N. W. 511. The detention of this cargo of grain amounting to over 50,000 bushels, upon the unauthorized claim for demurrage, constituted such duress of property that the payment of the demand must be deemed to have been made under moral compulsion, and not voluntarily, and the plaintiff was entitled to recover. The amount and the presumable value of the property, as compared with the sum demanded, and the fact shown that the wheat had been sold or contracted for delivery beyond Buffalo, are enough to lead to the above conclusion.

3. There was no real conflict in the evidence concerning the facts affecting the question as to whether the payment was made under duress of property, or voluntarily; nor were the facts such as to warrant any other conclusion than that which was involved in the charge to the jury, and which we have already referred to. The court did not err in taking this question from the jury.

4. The only remaining point relates to the admissibility of evidence on the part of the plaintiff, showing that the cargo had been contracted or sold "to go beyond Buffalo." This was admissible for the purpose of showing the importance to the plaintiff that he suffer no delay in securing the possession of the grain. What showed a necessity for possession on his part went to show his payment to be not voluntary, but compulsory. The order refusing a new trial is affirmed.

LONERGAN ET AL. v. BUFORD.

1893. 148 U. S. 581.

BREWER, J.— * * * Finally, it is objected that the last payment was voluntary, and, therefore, cannot be recovered, either in whole or in part, although it was in terms made under protest. It appears from the testimony that the defendants refused to deliver any of the property without full payment. This was at the commencement of the winter. The plaintiffs had already paid $175,500, and without payment of the balance they could not get possession of the property, and it might be exposed to great loss unless properly cared for during the winter season. Under those circumstances, we think the payment was one under duress. It was apparently the only way in which possession could be obtained, except at the end of a law suit, and in the meantime the property was in danger of loss or destruction. The case comes within the range of the case of Radich v. Hutchins, 95 U. S. 210, 213, in which the rule is thus stated: "To constitute the coercion or duress which will be regarded as sufficient to make the payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is, that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' Baltimore v. Lefferman, 4 Gill (Md.) 425; Brumagim v. Tillinghast, 18 Cal. 265; Mays v. Cincinnati, 1 Ohio St. 268."

In Stenton v. Jerome, 54 N. Y. 480, the defendants, who were stock brokers, held two United States bonds belonging to the plaintiff, which they threatened to sell unless they paid a balance claimed by them on account. On page 485 the court says: "Great stress, however, is laid upon the payment by the plaintiff of the balance shown by the account, as rendered, to be due from her. This payment was in one sense voluntary, as she was not compelled by physical duress to pay it, but the defendants held her two bonds, which they threatened at once to sell unless she would pay this balance. She had great need for the bonds and could not well wait for the slow process of the law to restore them to her, and she paid this balance, not assenting to the account and not assenting that it was justly due, for the sole purpose of releasing her bonds. Under such circumstances it is well settled that the law does not regard a payment as voluntary."

In Harmony v. Bingham, 12 N. Y. 117, it is said: "If a party has

in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion." See also, Baldwin v. Liverpool & G. W. S. S. Co., 74 N. Y. 125; McPherson v. Cox, 86 N. Y. 472; Spaids v. Barrett, 57 Ill. 289; Hackley v. Headley, 45 Mich. 569.

SWIFT, ETC., COMPANY v. UNITED STATES.

1884. 111 U. S. 22.

IN this case the Internal Revenue Bureau required the commission allowed to a dealer in proprietary articles, purchasing stamps from his own dies and for his own use, to be received in stamps instead of in money, and refused to modify its decision.

MATTHEWS, J.— * * * The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria.*

In Close v. Phipps, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: "The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under what the law calls a species of duress." And in Parker v. Great Western R. Co., 7 M. & Gr. 252, the wholesome principle was recognized that payments made to a common carrier, to induce it to do what by law, without them, it was bound to do, were not voluntary and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in Astley v. Reynolds, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities in Tutt v. Ide, 3 Blatchf. (U. S.) 249; and in Ogden v. Maxwell, 3 Blatchf. (U. S.) 319, it was held that illegal fees exacted by a collector, though sanctioned by a long continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be re-

covered back, on the ground that the payment was compulsory and not voluntary. And in Maxwell v. Griswold, 10 How. (U. S.) 242-256, it was said by this court: "Now, it can hardly be meant, in this class of cases, that to make a payment involuntary, it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment." To the same effect are the Steamship Co. v. Young, 89 Pa. St. 186; Cunningham v. Munroe, 15 Gray (Mass.) 471; Carew v. Rutherford, 106 Mass. 1; Preston v. Boston, 12 Pick. (Mass.) 7. In Beckwith v. Frisbie, 32 Vt. 559-566, it was said: "To make the payment a voluntary one, the parties should stand upon an equal footing." If a person illegally claims a fee *colore officii,* the payment is not voluntary so as to preclude the party from recovering it back. Morgan v. Palmer, 2 Barn. & C. 729. In Steele v. Williams, 8 Wels., Hurl. & Gord. 625, Martin, B., said: "If a statute prescribes certain fees for certain services, and a party assuming to act under it, insists upon having more, the payment cannot be said to be voluntary." "The common principle," says Mr. Pollock, Principles of Contract, 523, "is, that if a man chooses to give away his money, or to take his chances, whether he is giving it away or not, he cannot afterward change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice." Addison, Contracts 1043; Ashton v. Durant, 2 Strobh. 257.

No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted. * * *

UNITED STATES v. HUCKABEE.

1872. 16 Wal. (U. S.) 414, 432.

CLIFFORD, J.— * * * Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats, it is said, are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the substance. Foshay v. Ferguson, 5 Hill. (N. Y.) 158; Bk. v. Copeland, 18 Md. 317;

Eadie v. Slimmon, 26 N. Y. 12; 1 Story Eq. Jur., 9th ed. 239. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the party menaced as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury. Baker v. Morton, 12 Wall. (U. S.) 158. * * *

MOTZ v. MITCHELL.

1879. 91 Pa. St. 114.

IN this case Motz offered to prove that Mitchell obtained possession of a certain deed and used it for the purpose of extorting money from him as the price of its preservation or of permission to use it in defending his title. The court below rejected the evidence, saying that the payment of the money was "voluntary."

STERRETT, J.—* * * The principle contended for by the plaintiff in error, that money obtained by duress, extortion, imposition or otherwise involuntarily paid, may be recovered back, appears to be sustained in White v. Heylman, 10 Casey (Pa.) 142. In that case, money had been paid and a note given to procure the reconveyance of land, the title to which had been vested in a stranger by the wrongful act of an agent. After stating that the defendant was forced to pay his faithless agent money and give him the note in suit, in order to procure a transfer to himself of what was in reality his own, the court proceeded to say: "Neither the payment of the cash nor the giving of the note was voluntary, but both were extorted from the defendant and come within that class of cases in which money illegally claimed and paid has been recovered back, where goods, deeds, or papers have been wrongfully detained until the money has been paid."

The general rule, as stated in Chitty on Contracts 625, "seems to be, that the payment of money by the owner of goods, in order to redeem them from the hands of a person who unlawfully withholds them and demands such money, may be treated as a compulsory payment, so that the amount is recoverable, as having been obtained by oppressive means. The owner of the goods may have so urgent occasion for them that the ordinary action may afford very imperfect redress."

In Miller v. Miller, 18 P. F. Smith (Pa.) 486, it is said that in civil cases, the rule as to duress *per minas* has a broader application at the present day than formerly. Where a party has the property of another in his power, so as to enable him to exert his control over it to the prejudice of the owner, a threat to use this control may be in the nature of the common-law duress *per minas,* and enable the person threatened with this pernicious control to avoid a bond or note obtained without consideration, by means of such threats. The constraint that takes away free agency and destroys the power of withholding assent to a contract must be one that is imminent and without immediate means of protection, and such as would operate on the mind of a person of reasonable firmness. As it is expressed in Astley v. Reynolds, 1 Strange 915, the rule *volenti non fit injuria* is applied only "where the party had his freedom of exercising his will." The same general principle is also recognized in Colwell v. Peden, 3 Watts (Pa.) 327; Foshay v. Ferguson, 5 Hill (N. Y.) 154; Sasportas v. Jennings, 1 Bay (S. Car.) 470, and Collins v. Westbury, 2 *id.* 211.

If the plaintiff below obtained possession of the deed and used it for the purpose of extorting money from the defendant, as the price of its preservation or of permission to use it in defending his title, and by threats, express or implied, gave defendant to understand that the deed would be withheld or destroyed, unless his demand was complied with, the payment should be deemed involuntary and the wrong-doer should be compelled to make restitution.

Several offers were made for the purpose of showing the circumstances under which the alleged involuntary payment was made. * * *

The testimony embraced in the second offer should have been received, in connection with proof of other facts tending to show that the plaintiff obtained possession of the deed and used it for the purpose of extorting money from the defendant, by threats, express or implied, of withholding or destroying it, unless his demand was complied with.

Judgment reversed and a *venire facias de novo* awarded.

UNDUE INFLUENCE.

A contract may be avoided on the ground of undue influence when one of the parties has induced the other to enter into the contract by the unconscientious use of power afforded by

1. The parental, marital, fiduciary or confidential relations subsisting between them.

2. The mental weakness of the other, or

3. The necessities or extravagance of an expectant heir or one sustaining that character.

§ 61 (A).—When a Ground for Avoiding a Contract.

CONLEY v. NAILOR.

1886. 118 U. S. 127.

WOODS, J.—* * * The next and last ground alleged for annulling the deeds is that Nailor was induced to make them by the fraud and undue influence of the defendant. The ground upon which courts of equity grant relief in such cases is that one party, by improper means and practices, has gained an unconscionable advantage over another. The undue influence for which a will or deed will be annulled must be such that the party making it has no free will, but stands *in vinculis*. "It must amount to force or coercion, destroying free agency." Stulz v. Schaffle, 16 Jur. 909. See also Williams v. Goude, 1 Hagg. Eccl. 577; Armstrong v. Huddleston, 1 Moore, P. C. 478. In Eckert v. Florry, 43 Pa. St. 46, it was said by Strong, J.: "Now, that is undue influence which amounts to constraint, which substitutes the will of another for that of the testator. It may be either through threats or fraud; but however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made." The rule upon this subject was thus stated in Davis v. Calvert, 5 Gill & J. (Md.) 302: "A testator shall enjoy full liberty and freedom in the making of his will and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist and will render the instrument not his free and unconstrained act, is sufficient to invalidate it."

Tested by these rules, the charge that the deeds in question were procured by the fraud and undue influence of the defendant is without support. * * *

HARTNETT v. HARTNETT.

1894. 42 Neb. 23, 60 N. W. 362.

ACTION by John Hartnett against Thomas Harnett to cancel a deed. Decree for plaintiff. Appeal.

HARRISON, J.— * * * We now reach the main question in the case, viz., whether, under all the evidence given in the case, the plaintiff shall be allowed the relief demanded, and this we conclude must be answered in the affirmative. The rule by which we are guided in our consideration of the facts and circumstances in this case was announced in the case of Munson v. Carter, 19 Neb. 293, 27 N. W. 208,—a case very similar in its leading and governing facts

and incidents to the one at bar,—where it was held: "Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party, which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence." And the author of the opinion, in the text, makes a statement which is so appropriate in its application to the facts in the case at bar that we will quote it here, viz.: "The testimony shows beyond question that the mother was induced to execute the deed in controversy by the coarse language, threats, bluster, intimidation, and persistence of the son, and that it was not her voluntary act and deed." The oft-repeated threats, abuse, and importunities of the son to the father operated on the will of the father, and influenced and induced him to execute the conveyance in controversy; and we are satisfied that of his own will and volition, uninfluenced in the manner indicated, he would not have executed it. This brings it within the rule, and we conclude that the decree of the district court was just and right. In support of the doctrine of Munson v. Carter, *supra,* in addition to the cases therein cited and commented upon, we add the following: Edwards v. Bowden, 107 N. Car. 58, 12 S. E. 58; Pol. Cont. 524; Pom. Eq. Jur., § 951; 1 Pars. Cont. 393, 395; 1 Chit. Cont. 269, 273; 2 Greel. Ev., § 301. The decree of the lower court, in so much as it sets aside and annuls the conveyance described in plaintiff's petition, is affirmed.

STURTEVANT v. STURTEVANT.

1886. 116 Ill. 340, 6 N. E. 428.

SHOPE, J.— * * * It is important at the outset to ascertain what constitutes such undue influence as will vitiate a deed procured by its exercise over the grantor. It is not sufficient to avoid a will or a deed that its execution was procured by honest argument or persuasion, untainted with fraud. In Dickie v. Carter, 42 Ill. 376, this court said: "If all is fair, and the result of honest argument and persuasion, or of such influence as one may properly obtain over another, the will (deed) must stand." In Yoe v. McCord, 74 Ill. 44, we said: "To avoid a will the influence which is exercised must be undue, and this, in a legal sense, is something wrongful,—a species of fraud." The same doctrine is announced in many other cases. It follows that the proper and legitimate exercise of an influence fairly and honestly acquired, is not the exercise of an undue influence, and that a deed which, but for such influence, would not have been made, will still be sustained if made freely and as a result of the maker's

own conviction, and in the exercise of his own deliberate judgment. This being the law, does the evidence in this case show that the deeds in controversy were procured by the exercise of undue influence by appellant over appellee?

We find plenty of evidence in the record showing very kind feelings between appellant and appellee prior to the execution of the deeds and for a considerable time after, from which it might be inferred that each would have some influence over the other; but we are unable to see anything in the record which tends to show the exercise of any undue influence. * * *

MARKING ET AL. v. MARKING ET AL.

1900. 106 Wis. 292, 82 N. W. 133.

THIS was an action in equity to set aside a deed from Magdalena Marking, deceased, to her son, the defendant John, on the ground of undue influence. From a judgment setting aside the deed, John Marking appealed.

BARDEEN, J.— * * * There was nothing on the face of the transaction that would indicate that the son had taken advantage of his mother to secure an unjust benefit to himself. It was certainly not an improvident act for Mrs. Marking to convey the land to her son under the circumstances suggested. Considering the value of the property, the indebtedness against it, and the contract made and kept, the consideration was ample. The conveyance was eminently reasonble, and just. Moreover, the court has not found facts that would justify the interference of a court of equity. On the subject of undue influence in securing the deed, the court finds that the son did not attempt to deceive his mother, but that she followed his suggestions because she relied upon his judgment. There was no fear or coercion, no importunity, or even an appeal to the affections. The ground upon which courts of equity grant relief in such cases is that one party, by improper means and practice, has gained an unconscionable advantage over another. "It must amount to force or coercion destroying free agency." Conley v. Nailor, 118 U. S. 127; Dunlap v. Robinson, 28 Ala. 100; Mooney v. Olsen, 22 Kan. 69. Here both elements are lacking. There were no improper means or practices used, and no showing of an unconscionable advantage. Admit that the mother was old, infirm, and weak-minded. As said in Dailey v. Kastell, 56 Wis. 444, 14 N. W. 635, on page 453, 56 Wis., and page 638, 14 N. W.: "It is not unlawful to influence a weak-minded person to do that which is just, and for the best good of such person. Such influence is not undue,—in other words,

is not fraudulent,—and does not necessarily vitiate the act produced by it." The mother had a good memory, understood what was being done, and was not deceived. But we need not prolong the discussion. The plaintiff's case fails upon both the grounds suggested. The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the complaint.

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§ 61 (1)—Parental or Marital Relations.

WHITE v. ROSS.

1896. 160 Ill. 56, 43 N. E. 336.

CARTER, J.— * * * The third ground or proposition upon which the decree is sought to be sustained, and the one which we find is sustained by the evidence and supported by abundant authority, may be stated thus: That at, and before and after, the time or times when the deeds in question were made and delivered, the relation of parent and child existed in its full vigor between the mother, Ann White, and the daughter, Annie C. White; that the position of the mother was one of dominance and authority over the daughter, and of the daughter of dependence upon the mother; that the daughter confided in and trusted her mother implicitly; that the mother was already possessd of an abundance of means for her own support,—even of wealth,—and that the property conveyed to the mother by the daughter was of large value, exceeding $200,000, and embraced her entire estate and substantially all her means of support; that the daughter was an invalid, without any business, occupation or profession, wholly unacquainted with business affairs and the forms and instrumentalities by which conveyances of property are made from one person to another, and wholly unable, by reason not only of bad health, but of lack of business education, training and experience, to earn her own living; that nothing was paid or agreed to be paid to the daughter, Annie C. White, for all the vast property so conveyed; that she had no independent advice, and did not understand that she was divesting herself absolutely of all her property rights; that the gift was improvident, and unreasonable on the part of the daughter to make and unconscionable on the part of the mother to accept, and that under such circumstances the presumption of undue influence arises, and that the conveyances in question were obtained by undue influence of the mother over the daughter, and that the burden of proof is on the mother, and those claiming under her, to show that the daughter acted independently, advisedly and of her own free, intelligent will and accord, uninflu-

enced by the recipient of so munificent a gift, and no such proof having been made, that, independently of any question of actual fraud, the transaction must be held to be constructively fraudulent, and that a court of equity will raise a constructive trust and fasten it upon the conscience of the holder of the legal title, and convert such holder into a trustee for the party who, in equity, is regarded as the beneficial owner.

The ultimate facts stated in the last proposition are established by the evidence in this case, and are in substantial accordance with the findings of the two chancellors who, on different trials, heard the case below on both oral and written testimony. That such conveyances of property, made under such circumstances, are presumptively voidable there can be no reasonable doubt. This rule in equity is established by the great weight of authority both in England and this country, and is founded on principles of justice and morality. (Hoghton v. Hoghton, 15 Beav. 278; Cooke v. LaMotte, *id.* 234; Coutts v. Ackworth, 8 L. R. Eq. Cas. 558; Harvey v. Mount, 8 Beav. 439; Turner v. Collins, L. R. 7 Ch. App. 329; Burry v. Oppenheim, 26 Beav. 594; Ashton v. Thompson, 32 Minn. 25; Carter v. Tice, 120 Ill. 277; Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593; Noble v. Moses, 81 Ala. 530, 60 Am. Rep. 175; 2 Pomeroy's Eq. Jur., § 926, note; Schouler on Dom. Relat., § 271.) In such cases courts of equity will interfere upon grounds of public policy, or, as often stated, for the preservation of mankind, and unless the donee can show affirmatively that the transaction is "a righteous one" it will be set aside.

It is contended by appellants that such is not the rule in this country, but that the parental authority over the child is only a circumstance to be proved with others tending to establish undue influence; that notwithstanding a conveyance or gift be shown to have been made by the child to the parent at a time, though of full age, when the child was under the dominion of the parent, still the transaction cannot be impeached without some affirmative proof of the exercise of undue influence on the part of the parent, or that the parent was guilty of some fraud, imposition or wrongdoing in obtaining the advantage bestowed; and it is claimed that their contention is supported by the authority of the Supreme Court of the United States in Jenkins v. Pye, 12 Pet. (U. S.) 24. Counsel quote from the principal opinion in that case, where, in referring to the rule claimed to have been laid down by the English cases, it was said, among other things: "We * * * cannot discover anything to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient showing undue influence exercised by the parent operating on the fears or hopes of the child, and sufficient to show reasonable ground to presume that the act was not perfectly free and voluntary on the part of the child; and in some cases, although

there may be circumstances tending, in some small degree, to show undue influence, yet if the agreement appears reasonable it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed." "We should not be disposed to adopt or sanction the broad principle contended for, that a deed of a child to a parent is to be deemed *prima facie* void. It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child without consideration, on account of their relationship, is assuming a principle at war with all filial as well as all parental duty and affection, and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child." Hill on Trustees, 157; Newland on Contracts, 445, 446; Perry on Trusts, § 201; 1 Story's Eq. Jur., § 306, and other authorities, are also cited by counsel as denying that conveyances made under such circumstances are *prima facie* invalid.

That the text books and reported decisions are not fully harmonious in their statement of the rule is certainly true. In Jenkins v. Pye, the father paid a valuable, though perhaps an inadequate, consideration for the property conveyed, and the doctrine of *laches* was also applied as a ground for denying relief. In a separate opinion Mr. Justice Cathron, while concurring in the decision of the case on the ground of *laches*, took issue with the opinion of the court delivered by Mr. Justice Thompson, on the other branch of the case. In the subsequent cases of Taylor v. Taylor, 8 How. (U. S.) 184, and Allore v. Jewell, 94 U. S. 506, the doctrine as announced by the same court does not materially differ from the general current of authority on the subject, and the question of unreasonableness and unfairness in the transaction is made to cut an important figure. Judge Story, in his work on Equity Jurisprudence (vol. 1, § 309), says: "The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter, and therefore all contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy, and if they are not entered into with scrupulous good faith, *and are not reasonable under the circumstances, they will be set aside*, unless third persons have acquired an interest under them." So in Perry on Trusts it is said, that while courts of equity will scrutinize conveyances of property by children to their parents, they are not *prima facie* void, but that there must be some affirmative proof of undue influence or other improper conduct to render the transaction void. But it is also said that "the position and influence of parent over a child are so controlling that the transaction should be carefully examined, and sales by a child to

a parent must appear to be fair and reasonable." So, also, in Hill on Trustees, 157, it is said that "every contract or conveyance whereby benefits are secured to parents by their children must be perfectly fair and reasonable in all its terms and circumstances, or otherwise it will be set aside." It is true the author says that before this will be done it will be necessary to prove the exercise of undue influence, or to establish some other case of actual or constructive fraud against the parent. So, too, in the citation from Newland on Contracts, the author makes the reasonableness of the transaction an important element. It is there said that equity has refused to interfere because of the mere relation of parent and child, especially where the agreement was reasonable, or entered into to effect a laudable purpose. In Oliphant v. Liversidge, 142 Ill. 160, this court, in sustaining a deed of gift from father to child, said (p. 170): "Nor does any presumption of fraud arise from the fact that the grantor is the father of the grantees. In the case of a gift from a child to a parent undue influence may be inferred from the relation itself, but never where the gift is from the parent to the child." In Finucan v. Kendig, 109 Ill. 198, and Patterson v. Johnson, 113 *id.* 559, this court distinctly recognized the question of unreasonableness and improvidence in the transaction as an element to be considered in determining its binding force upon the parties. In the latter case such facts and circumstances were proved as showed the transaction a reasonable and proper one, and this court said (p. 572): "The record shows that there was no influence whatever used by the father to procure the deed, and that it was made by the daughters of their own volition. The making of the deed was a graceful tribute of filial affection."

If a child possessing wealth should while under parental control, though past minority, make a deed of gift of property of substantial value to his indigent parent, sufficient to maintain such parent in comfort, and even elegance, the remainder of his life, but reserving sufficient for his own needs, thus eliminating from the transaction all improvidence, all unreasonableness and all apparent unconscientiousness on the part of the parent, it might be justly contended that the rule would be a harsh one that would cast the burden of proof on the parent, or on those claiming under him, to prove that no undue influence was resorted to to obtain the gift. But where, as in this case, the transaction appears to have been an improvident and unreasonable one for the child to enter into, and one apparently involving the taking of an unconscionable advantage by the parent in accepting and retaining the property, there can be no doubt, from the standpoint of any well-considered case, that the burden of proof is cast upon the parent to prove that the transaction was, in the language often used, "a righteous one." * * *

TUCKE ET AL. v. BUCHHOLZ.

1876. 43 Iowa 415.

BECK, J.—The defendant married the mother of plaintiffs, who was then a widow, when the eldest of them was about nine years of age. From this time until they reached their majority he stood in the place of a father and exercised parental authority and control over plaintiffs. Their father died seized of the land in controversy, and devised to their mother a life estate therein, with remainder to the plaintiffs. Defendant, after his marriage with plaintiffs' mother, occupied the land and made valuable improvements thereon. The mother died after the oldest of plaintiffs had attained his majority; defendant was thereupon appointed guardian for plaintiffs, who were then minors. After the three oldest of plaintiffs had become of age, they united in a bond obligating themselves to convey to defendant the land in controversy for the consideration of $500 to be paid to each, for which defendant executed his promissory notes payable at a future day, without interest. The other plaintiffs, upon reaching their majority, executed a like obligation. The plaintiffs in this action sued to set aside these contracts, on the ground that their execution was procured through the fraud of defendant, and undue influence exerted by him over them.

We think the evidence before us supports the decree rendered in the Circuit Court. From their earliest childhood the plaintiffs were subject to the authority of defendant, who stood, as to them, *in loco parentis*. The evidence shows that, while he was not unkind towards plaintiffs, he exerted his authority over them with a firm hand. They were unusually obedient, and entertained the respect for him due to a parent. The evidence clearly shows that the contracts were executed at his solicitation, and upon requests that, in effect, were commands. The plaintiffs, at the time of the execution of the instruments, were not of ordinary intelligence—certainly had not the acquaintance with business affairs usually possessed by persons of their age. They did not have a full knowledge of the extent of their interest in the lands. Defendant represented to one or more of plaintiffs that they were liable to lose the land, thus exciting their fears. The consideration he undertook to pay the plaintiffs for the property was less than half its value.

The record presents the case of defendant standing *in loco parentis* to all the plaintiffs, and the guardian of all but one of them, procuring the execution of the contracts after their majority, but before they were emancipated from the habit of obedience and deference to him, by the exercise of his authority, by solicitation, and, in one instance, through fear excited by false representations.

The contract, besides, is unconscionable, the consideration therefor being greatly inadequate. Contracts between persons holding

towards each other relations of this character, are regarded by equity with jealousy; under its rules the rights of the weaker party will be protected, and the power and influence of the stronger, acquired by long habits of authority exercised and obedience rendered, will be restrained. 1 Story's Eq., §§ 309, 317. * * *

The principle also applies where a contract is made with a grandparent, grandchild, uncle, aunt, nephew, niece, brother or sister, and it appears from all the facts and circumstances of the particular case that such relative has a predominant influence in the family. As between these relatives such influence is not presumed from mere relationship. Benjamin, Principles of Contract, p. 233.

DARLINGTON'S APPEAL.

1878. 86 Pa. St. 512.

TRUNKEY, J.— * * * It is unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she be in the menial service of a rude hut, or in daily toil for support of her family, or in charge of an elegant mansion. When he commands, she obeys; when he persuades, she yields; when he gently hints a wish, she grants. When treated almost as a servant—when governed and corrected as a child, as did our sturdy ancestors—or when confided in as a companion and equal, her will is subdued to her lord. True, there are exceptional women, whose nature is unaffected by marriage, who cannot yield or bend, and, as wives, would not be happy, save with effeminate husbands; but these are not so numerous as to cloud perception of the mental and moral differences of the sexes. The common-law rights and disabilities, consequent on marriage, grew out of these differences, and the husband's power and influence distinctly appear. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is, therefore, called in our law-French a *feme covert, fœmina viro cooperta;* is said to be *covert-baron,* or under the protection and influence of her husband, her *baron,* or lord; and her condition during her marriage is called her *coverture.*" One of the reasons for suspension of her legal existence is said to be "for her own security in

guarding her against her husband's influence over her by disabling her from disposing of her own property." The disability to dispose of her own property, of course, related to her land, which she or her heir could hold and enjoy after the end of the husband's estate therein. By marriage, he became entitled to all his wife's personalty and the use of her lands. Under advancing culture and civilization, modern legislation has materially changed the common law respecting the rights and disabilities incident to the marriage relation.

In Pennsylvania, the wife may hold and enjoy her own property, and easy modes are provided for her disposal of it. But the unity of person remains, resting on a foundation older than the common law, and the husband's influence over his wife, so strongly expressed by the common-law writers, will end only with the marriage relation itself. The unfeeling greed, that, in a less refined age, transferred all the wife's personal property and the use of her real estate to her husband, is not entirely extinct. Many a husband, in all sincerity, believes the common-law rule better than the statute, for the former accords with his avarice. Such an one, as well as one who cares not for right, is inclined to get control of his wife's property; and to that end, if she does not readily and quickly yield, will subject her to like importunities as sent Martha Darlington weeping and asking advice; yet, in a little time, against the advice, compelled her to make a deed, acknowledged in due form, vesting her estate in her husband. Surely, if anywhere, the rule that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence, and that the arrangement is fair and conscientious, should be applied in a case where the wife conveyed her property to her husband.

In Weeks v. Haas, 3 W. & S. (Pa.) 520, Gibson, C. J., said, in speaking of husband and wife: "Her dependence on him is more entire than the dependence incident to any other of the domestic relations; and the law relaxes its grasp on no means within its power to prevent him from misusing it. When it is her purpose to give him her land, the accomplishment of it by means of a conveyance to a convenient friend cannot be prevented, yet the step is so obviously the consequence of the husband's avarice, that it is seldom to be commended." When it is truly her purpose to give him her land it ought not to be prevented. But in determining if that was her purpose, when the step is obviously the consequence of her husband's avarice, will a rule of proof be adopted less favorable to her than to a client who dealt with his attorney, or to a principal who dealt with his agent? Ought not the rule to be more strictly adhered to as the relation is closer and more confidential? or as the one party is stronger and the other weaker? * * *

HESSICK v. HESSICK.

1897. 169 Ill. 486, 48 N. E. 712.

WILKIN, J.— * * * On the first proposition the position of counsel is, that under the law, it appearing that appellee fully understood the provisions and effect of the contract and no positive fraud or deception being shown upon the part of the husband, it was not necessary to the validity of the contract that the amount and character of his property should have been disclosed to her before executing the agreement. This position is doubtless correct as a general rule, but there is a well-defined exception to it in the case of antenuptial agreements. It has been held by many courts that if the provision made for an espoused wife is unreasonably small in proportion to the estate of the intended husband, that fact alone will raise a presumption of a fraudulent concealment of the husband's estate and invalidate the agreement at the instance of the wife, unless it be shown by the husband, or those claiming the benefit of his agreement, that she executed it with knowledge of the extent and value of his property. The reason of the rule is, that after the marriage engagement is entered into, the relationship between the parties is confidential, and the intended wife is supposed to confide in the man to who she is betrothed, to deal fairly and justly with her. The doctrine can be no more clearly and positively stated than was done by the late Justice Scholfield in Taylor v. Taylor, 144 Ill. 436, as follows (p. 445): "Parties to an ante-nuptial contract occupy a confidential relation toward each other. (Kline's Estate, 64 Pa. St. 124; Pierce v. Pierce, 71 N. Y. 154; Rockafellow v. Newcomb, 57 Ill. 86.) While they may lawfully contract with each other where there is full knowledge of all that materially affects the contract, yet where the provision secured for the intended wife is disproportionate to the means of the intended husband it raises the presumption of designed concealment, and throws the burden upon those claiming in his right to prove that there was full knowledge on her part of all that materially affected the contract." And it was there held: "The burden here was, therefore, upon appellants to prove, by satisfactory evidence, that appellee had knowledge of the character and extent of her intended husband's property and of the provisions and effect of this instrument, or, at all events, that the circumstances were such that she reasonably ought to have had such knowledge at the time this instrument was executed." The foregoing language was quoted and adopted in the later case of Achilles v. Achilles, 151 Ill. 136, and announced as the settled law of this state. * * *

§ 61 (2)—Fiduciary or Confidential Relations.

A FIDUCIARY or confidential relation, either in a general or a limited sense, subsists between the following persons: Guardian and ward (Eberts v. Eberts, 55 Pa. St. 110; McParland v. Larkin, 155 Ill. 84, 39 N. E. 609), trustee and beneficiary (Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 93; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119), agent and principal (Darlington's Estate, 147 Pa. St. 624, 23 Atl. 1046; Prince v. Dupuy, 163 Ill. 417, 45 N. E. 298), attorney and client (Howell v. Ransom, 11 Paige (N. Y.) 538; Willin v. Burdette, 172 Ill. 117, 49 N. E. 1000), physician and patient (Bogie v. Nolan, 96 Mo. 85, 9 S. W. 14; Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808), pastor and parishioner (Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56).

BEACH v. WILTON.

1910. 244 Ill. 413, 91 N. E. 492.

CARTER, J.— * * * Counsel for defendants in error argue that a fiduciary relation, under the law, does not exist unless it grows out of the relation of administrator and heir, guardian and ward, attorney and client or principal and agent. Such is not the law. In Pomeroy's Equity Jurisprudence (vol. 2, 3d ed., § 956), that author, in discussing this question, says: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal. It may be moral, social, domestic or merely personal." The rule as thus stated has been repeatedly quoted with approval by this court. (Roby v. Colehour, 135 Ill. 300; Thomas v. Whitney, 186 *id.* 225; Walker v. Shepard, 210 *id.* 100; Irwin v. Sample, 213 *id.* 160.) The fiduciary relation exists between parties where there is a relation of trust and confidence between them,—that is, where confidence is reposed by one party and the trust accepted by the other. In Mayrand v. Mayrand, 194 Ill. 45, this court said (p. 48): "The term fiduciary or confidential relation, as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The

origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?"

There is a clear distinction between that class of contracts that are voidable because they have been executed through actual undue influence, consciously and designedly exerted, and those contracts that are sought to be set aside because of the fiduciary relation existing between the parties. In the former case, the undue influence being established as a fact, a contract obtained by its means is voidable and may be set aside without the necessary aid of any presumption, while where the fiduciary relation exists equity does not deny the possibility of valid tranactions between the parties, but, when such fiduciary relation is proven, raises a presumption against the validity of the contract and casts upon the party desiring to uphold it the burden of proving affirmatively that such contract is not against equity and good conscience, thereby overcoming the presumption. (2 Pomeroy's Eq. Jur., 3d ed., §§ 955, 956.) The same author, in discussing tranactions which are questioned because of the fiduciary relation between the parties, says (§ 955): "No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element of the transaction. If any such fact be present it is incidental, not necessary,—immaterial, not essential. Nor does undue influence form a necessary part of the circumstances, except so far as undue influence, or, rather, the ability to exercise undue influence, is implied in the very conception of a fiduciary relation, in the position of superiority occupied by one of the parties over the other, contained in the very definition of that relation. This is a most important statement,—not a mere verbal criticism. Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relations as though they constituted one and the same doctrine." Mayrand v. Mayrand, *supra;* Thomas v. Whitney, *supra.*

Transactions of parties between whom the fiduciary relation exists are *prima facie* voidable upon grounds of public policy. They will be closely scrutinized by a court of equity, and relief will be granted unless the party claiming the benefit of the contract shows, by clear and convincing proof, that he acted with perfect good faith and did not betray the confidence reposed in him. (1 Beach on Modern Law of Contracts, § 825; Thomas v. Whitney, *supra;* Casey v. Casey, 14 Ill. 112.) A confidential relation gives cause for suspicion. If a reasonable suspicion exists that confidence has been abused where reposed, the contract should be set aside. (Uhlich v. Muhlke, 61 Ill. 499; Dowie v. Driscoll, 203 *id.* 480.) * * *

KYLE ET AL. v. PERDUE ET AL.

1891. 95 Ala. 579, 10 So. 103.

WALKER, J.— * * * There are well-established rules to be applied in passing upon transactions between persons whose relations are such as to suggest that in dealings between them confidence is reposed and accepted to such an extent that one of them is subject to the influence or ascendency of the other. When such a relationship is shown to exist, if the one who was in a position to exert the influence claims the benefit of a contract with the person bestowing the confidence, the burden is cast upon the former to show affirmatively that the influence of his position was not unduly exerted; that the utmost good faith was exercised; and that all was fair, open, voluntary, and well understood. This rule as to the burden of proof is of familiar application to contracts by which benefits are conferred by a *cestui que trust* upon his trustee, by a ward upon his guardian, by a child upon his parent, by a client upon his attorney, by a patient upon his physician, or by any one upon his priest or spiritual adviser. Noble v. Moses, 81 Ala. 530, 1 So. 217; Dickinson v. Bradford, 59 Ala. 581; Malone v. Kelley, 54 Ala. 532; Boney v. Hollingsworth, 23 Ala. 690; Johnson v. Johnson, 5 Ala. 94; Marx v. McGlynn, 88 N. Y. 357; Huguenin v. Baseley, 2 White & T. Lead. Cas. 1156. The relations here mentioned are but instances in which the principle is applicable. It is not essential that any formal or technical relationship of fiduciary character has been established between the parties. It suffices that they stand in such a relation to each other that, while it continues, confidence is justifiably reposed by one, and the influence which naturally grows out of that confidence is possessed by the other. When the parties are merely friends of each other, and deal upon terms of equality, the burden of showing the invalidity of any transaction between them is upon the one who assails it. But where their situation is such that, as a matter of fact, confidence is reposed on one side, and there is superiority on the other side, resulting from the influence acquired by the acceptance of the confidence bestowed, there is a presumption of undue influence to be rebutted by the superior party. Transactions between such persons may be entirely valid, but the one who is in a position to influence the other must show that the duty which he assumed by the acceptance of the confidence has been fully performed. Voltz v. Voltz, 75 Ala. 555; Shipman v. Furniss, 69 Ala. 555; Waddell v. Lanier, 62 Ala. 347; Ferguson v. Lowery, 54 Ala. 510; Cowee v. Cornell, 75 N. Y. 99; Billage v. Southee, 9 Hare 534; Tate v. Williamson, L. R. 2 Ch. App. 55; Kerr, Fraud & M. (Bump's Ed.) 183; 2 Pom. Eq. Jur., §§ 956, 963; 8 Amer. & Eng. Enc. Law, 647-654. * * *

KNOX v. SINGMASTER ET AL.

1888. 75 Iowa 64, 39 N. W. 183.

IN this case defendant, Frank Singmaster conveyed, in 1877, his farm to his three minor children, after the death of his wife, to avoid his creditors, without consideration. From 1878, having remarried, until suit brought he lived on it, and improved and treated it as his own. During most of the time, until she came of age, one of his children lived with him, and was well treated. Four days after she came of age, at her father's request, she conveyed her interest in the farm to him, without any threats or promises on his part. * * *

ROBINSON, J.— * * * The farm in controversy consists of 140 acres, worth from $4,000 to $5,000. The consideration recited in the deed from plaintiff to her father was "natural love and affection," and none other was paid. Plaintiff seeks to have this deed set aside, on the ground that it was obtained by undue and improper influences. She alleges that defendants, by means of various acts and devices, obtained her confidence, kept her from communication with friends, and those competent to advise; and, taking advantage of her youth and inexperience in business matters, procured the deed. We have examined the evidence submitted with care, and conclude that the charge of improper acts on the part of defendants are not sustained. Plaintiff seems to have been well treated while living with her father, and to have been supplied with all things necessary for her comfort and station in life. Her step-mother was evidently faithful to her trust, and sought the best interests of her charge. The plaintiff lived with her father voluntarily, and was under nothing but a wholesome and proper restraint while at his house. Nothing was ever said to her about the conveyance of her interest to her father until two days before the deed was made. She was then asked if she would make the deed, and said that she would, and the deed was made accordingly. She knew about the value of the land at the time, and her rights were explained to her when the deed was executed. At this time she was entirely satisfied to make the deed, and on the same day explained to a friend that the land had been conveyed to herself and sisters because of the embarrassments in business of her father. She was evidently of the opinion at that time that the land rightfully belonged to her father. She is shown to have been well educated in the various branches of a common-school education, and to be intelligent. She admits that she agreed to make the deed without threat or promise or inducement of any kind. It is true she says that, after she had told her father she would make the deed, he told her she might make a visit to distant friends; but this is denied by the father, and plaintiff admits that she never spoke of the matter to either defendant afterwards. She seems to have been satisfied with

what she had done until after she left home the next winter. Some time after the deed was made defendants discovered that she was receiving attention from the person she afterwards married, and they objected to him as not a suitable person for her to marry. The grandparents show considerable feeling against defendants, and one or two other relatives seem to encourage the plaintiff in prosecuting this suit. In fact, we cannot come to any other conclusion than that this action would never have been deemed advisable by plaintiff except for the interfernce of others. Appellee insists that the deed is *prima facie void,* because made, without consideration, by a child to a parent. It is time that deeds of this character are closely scrutinized by courts of equity, especially where, as in this case, the child is but just released in law from parental control. In many cases the fact that a deed was so executed would be sufficient to authorize a court of equity to set it aside. Samson v. Samson, 67 Iowa 258, 25 N. W. 233; Sparagur v. Hall, 62 Iowa 500, 17 N. W. 743. But each case depends largely upon its own facts. In this, if the property conveyed by the child had been acquired from some other source than the father, or if, having been derived from him, it had constituted but a part of his property, and had been conveyed as an absolute gift, with no purpose of retaining an interest in it, we should be inclined to apply a different rule from that which must govern under the facts as we find them. The evidence satisfies us that the property conveyed by Frank Singmaster to his children included about all that he then owned; that it was not his purpose to divest himself of the ownership of the land, but to protect his beneficial interest therein by transferring the legal title to his children; that he has always retained control of the land, and treated it as his own. It is true that the purpose of the conveyance was fraudulent in law, and that he could assert no adverse claim without the consent of his grantees. But the fact that the land was always treated and considered by all the parties in interest as belonging to the father, notwithstanding the conveyance, and that no consideration passed from planitiff therefor, may well be considered, in connection with her act of reconveyance, as explaining her reasons for it. We are satisfied that plaintiff was competent to make the deed in question; that it was her free and voluntary act, made without undue influence, and for what she considered a praiseworthy object. We think it must be held valid. * * *

MICHAEL v. MARSHALL.

1903. 201 Ill. 70, 66 N. E. 273.

CARTWRIGHT, J.— * * * It is the rule that a gift or conveyance by a party to one sustaining a fiduciary relation to him is, upon his motion, *prima facie* voidable, and the burden of proof is cast on the one sustaining such relations to show fairness, good faith and the absence of undue influence. But that rule is not to be applied to a will, since the questions involved are entirely different. The law, in raising a presumption, usually applies to certain facts the conclusion derived from experience, and in the case of wills, knowledge and experience teach that persons in confidential relations are very likely to be the beneficiaries of wills freely made, and of the most natural character. No one would think of raising a presumption against a will in favor of a wife or husband, child, or father, because fiduciary relations might exist, and casting the burden upon the beneficiary to disprove undue influence. It was held in Rutherford v. Morris, 77 Ill. 397, that the fact the beneficiaries of a will are those by whom the testator was surrounded and with whom he stood in confidential relations at the time of its execution was no ground for inferring undue influence. * * *

McPARLAND ET AL. v. MARGARET LARKIN.

1895. 155 Ill. 84, 39 N. E. 609.

PER CURIAM.— * * * On February 24, 1882, six days after attaining her majority, Margaret executed a deed, purporting to convey to her sister, Mary Ann McParland, her one-third interest in said real estate, at which time she was paid a small sum of money. This deed, as alleged in the bill, was procured by deception and undue influence exerted by her guardian, James McParland, over her, and without knowledge on her part of her rights in the premises or of what was due her out of the estate of her father, and that said deed was executed relying solely upon her guardian, in whom she had great confidence, and that, in fact, she was not aware of having conveyed away her interest until a short time before the filing of her bill. The sister, Mrs. McParland, testified that she tried to take her mother's place toward complainant, and that the latter looked up to her as such, and the evidence tends strongly to show that complainant looked to her guardian as taking the place of her father. The guardian did not make his final report until the 25th of May following the making of said deed, so that, in effect, the guardianship continued until long after the making thereof. Gilbert v. Guptil, 34 Ill. 112; Schouler Dom. Rel., § 382.

It is, however, contended, that the deed was made, with full knowledge of all the facts, six days after complainant had arrived at her majority, without undue influence and for a good and sufficient consideration, and its validity is not, therefore, to be questioned. It will be readily admitted that if the parties were dealing at arm's length, fraud must be shown to justify setting aside the deed (Baird v. Jackson, 98 Ill. 78; Warwick v. Hull, 102 *id.* 280); and it may be generally said, that where the guardianship has terminated and the influence of the guardian upon the ward has ceased, so that they can be said to stand upon an equality, transactions between them will be regarded as binding. (Schouler Dom. Rel., § 389). "But such transactions are always to be regarded with suspicion; and where the influence still continues, as, if the ward be a female or a person of weak understanding, and the guardian continues to control the property or to furnish a home, the court is strongly disposed to set aside the bargain altogether." But these observations have but little, if any, bearing here, as in this case the relation of guardian and ward has not been legally dissolved. In such case, as said by Pomeroy (2 Eq. Jur. 961): "The relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious. The presumption against them is so strong that it is hardly possible for them to be sustained." So in Gillette v. Wiley, 126 Ill. 310, where the guardian procured his ward, after the latter, a young man, had attained his majority, to sign a receipt in full for all money which came into his hands as guardian, the ward not reading the paper or acquainting himself with its contents, but relying solely on the statement of his guardian as to its character and purport, it was held that the transaction was void, even as against a surety upon such guardian's bond, who had taken a mortgage on the latter's land as indemnity against loss as surety; and it was there said: "Ordinarily, one having the means of information as to the contents of a paper executed by him, will * * * be held to have known the contents, and will not be permitted to assert his ignorance of its contents to avoid responsiblity according to its real import. Here, however, the signing of this receipt was the will and act of the guardian, rather than that of appellee. Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy. From the confidential relation between the parties it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them, prejudicially affecting the interests of the ward, will be held to be constructively fraudulent. (Carter v. Tice, *et al.*, 120 Ill. 277.) The doctrine is thus stated in 1 Story's Eq. Jur., § 217: "Where the guardianship has, in fact, ceased, by the majority of the ward, the

courts 'will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation became thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian, for in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased,—as, if the accounts between the parties have not been fully settled, or if the estate still remains, in some sort, under the control of the guardian.' "

Here the ward was a female, barely past the age of eighteen years, and practically without knowledge or experience in business affairs. The peculiar interests of the guardian were opposed to her own. His wife then owned the other two-thirds of the realty in question, and by this deed was acquiring the third belonging to the ward. The ward was induced to execute a deed prepared by the guardian for her signature, for an inadequate consideration,—greatly less than the real value of her interest, unless there be taken into consideration her prior support and maintenance in her sister's family. True, the presumption of undue influence of the guardian is attempted to be overthrown by proof. But as said in the case just quoted from, "the presumption of influence on the part of the guardian, and the dependence of the ward, continues after the legal condition of guardianship has ended, and transactions between them, during the continuance of the presumed influence of the guardian, will be set aside, unless shown to have been the deliberate act of the ward, after full knowledge of her rights. In all such cases 'the burden rests heavily upon the guardian to prove the circumstances of knowledge and free consent on the part of the ward, good faith and absence of influence, which alone can overcome the presumption.' " It is not necessary, in such cases, that actual and intentional fraud be established. It is sufficient, when the parties sustained the relation of guardian and ward, that the former has gained some advantage by the transaction with his ward, to throw the burthen of proving good faith and absence of influence, and of knowledge and free consent of the ward, upon the guardian. This we are not prepared, after the most careful consideration of the evidence, to say has been done, and the decree of the chancellor setting aside the deed must be affirmed. Nor can it make the slightest difference that the conveyance was made to the wife of the guardian, under whom he subsequently acquired title. As already seen, both the husband and wife stood in the relation of parents to complainant, while the husband was guardian. The relations precluded their deriving advantage from the ward, and it was their duty to protect her estate from spoilation, from whatever source. * * *

§ 61 (3)—Mental Weakness.

YOUNT v. YOUNT.

1896. 144 Ind. 133, 43 N. E. 136.

MONKS, J.— * * * Appellant insists "that weakness or feebleness of mind itself is not sufficient to avoid a deed; that the alleged misrepresentations were not such as she had the right to rely upon; that the threats complained of do not amount to duress, and that there is no allegation of an offer by appellee to restore the consideration received by her before the commencement of the action; and that for these reasons the complaint was insufficient, and the demurrer should have been sustained." It is true that weakness of mind alone does not render one incapable of making a contract. Weakness or feebleness of mind may, however, become of controlling influence, when connected with other facts tending to establish fraud. While mental weakness alone may not be sufficient to destroy capacity to contract, yet if it is accompanied by undue influence, duress, inadequacy of consideration, misrepresentations, concealment, taking advantage of ignorance, inexperience, and want of advice, and the like, a conveyance procured by such means will be set aside. When a person is weak and enfeebled in mind, by reason of age, or from any other cause, and another takes advantage of such weakness, and by any threats, artifice, or cunning, or undue influence he may possess, or by improper practices, induces such person to execute a contract which, in the free use of his deliberate judgment, he would not have entered into, such contract should be set aside for fraud. It was not necessary to allege in the complaint that appellee was at the time of unsound mind, or in such a state of mental imbecility as to render her entirely incapable of making a deed. It is sufficient to allege facts which show that, from her sickness and infirmities, she was at the time in a condition of mental weakness, and that there was either gross inadequacy of consideration for the conveyance, or that by improper practices, undue influence, misrepresentation, or concealment, or taking advantage of her ignorance, she was induced to execute a deed which, in the free exercise of her deliberate judgment, she would not have done. Undue influence generally occurs when one of the parties is weak in intellect, or is so situated or related to the other party as to be under his influence. What the relation may be is not material, if confidence is reposed and influence obtained. When one of the parties is old and feeble, illiterate, and weak-minded, from sickness or other cause, very slight circumstances will cast the burden on the other party. Wray v. Wray, 32 Ind. 126; Ikerd v. Beavers, 106 Ind. 483, 488-490, 7 N. E. 326, and cases cited; McCormick v. Malin, 5 Blackf. (Ind.) 509; Ashmead v. Reyn-

olds, 134 Ind. 139, 33 N. E. 763, and cases cited; *id.*, 39 Am. St. 238, and note on page 244; Stumph v. Miller, 142 Ind. 442, 41 N. E. 812; Harding v. Handy, 11 Wheat. (U. S.) 125; Harding v. Wheaton, 2 Mason (U. S. 378, Fed. Cas. No. 6,051; Parker v. Parker, 45 N. J. Eq. 224, 16 Atl. 537; Giles v. Hodge, 74 Wis. 360, 43 N. W. 163; Hemphill v. Holford, 88 Mich. 293, 50 N. W. 300; Cowee v. Cornell, 75 N. Y. 99; Greene v. Rowarth (N. Y.), 21 N. E. 165; Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430; 1 Story Eq. Jur., § 239; 2 White & T. Lead. Cas. Eq. 1206-1210, 1230-1250; 2 Pom. Eq. Jur., § 947; 27 Am. & Eng. Ency. Law 453-459, 461, 489. * * *

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§ 61 (4)—Necessities or Extravagance of Expectant Heir.

STEELE ET AL. v. FRIARSON ET AL.

1887. 85 Tenn. 430, 3 S. W. 649.

LURTON, J.— * * * No fraud in fact is either proven or charged. The proof abundantly establishes that Mr. Friarson, as security for Thomas S. Steele, had paid debts amounting to between twelve and fourteen thousand dollars. This assignment of his expectancy was voluntarily made, as the only means by which any part of this large and meritorious debt could be paid. Is such an assignment of the expectancy of an heir void as matter of law? Whatever may be the rule at law concerning the validity of the assignment of an interest or right not in existence, there can be no doubt that courts of equity will give effect to such assignments, fairly made, in behalf of innocent purchasers.

"Contingent interests and expectancies may not only be assigned in equity, but may also be the subject of a contract, such as a contract of sale, when made for a valuable consideration, which courts of equity, after the event has happened, will enforce." "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such case, if made *bona fide*, for a valuable consideration, it will be enforced in equity after the death of the ancestor,—not, indeed, as a trust attaching to the estate, but as a right of contract." Story Eq. Jur., § 1040b.

The ground upon which such assignments are enforced in equity is stated most satisfactorily by Prof. Pomeroy: "The doctrine of equitable assignment of property to be acquired in future is much broader than the jurisdiction to compel the specific performance of contracts. In truth, although a sale or mortgage of property to be acquired in future does not operate as an immediate alienation at law,

it operates as an equitable assignment of the *present possibility,* which changes into an assignment of the equitable ownership as soon as the property is acquired by the vendor or mortgagor; and because this ownership, thus transferred to the assignee, is equitable, and not legal, the jurisdiction by which the right of the assignee is enforced, and is turned into a legal property accompanied by the possession, must be exclusively equitable. A court of law has no jurisdiction to enforce a right which is purely equitable." Pom. Eq., § 1288. Again, he says, that, legislation recognizing as legal such assignments out of the way, "according to the general course of decision (such rights), are assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility has changed into a vested interest or possession." *Id.,* § 1287.

Even at law the sale of an interst in the lands of an ancestor living has been enforced, but generally by aid of the operation of the doctrine of estoppel springing from the covenants in the deed. The argument that the assignment now under discussion contains no covenants might be effective in a court of law; but, regardless of the doctrine of estoppel, such an assignment or sale is operative in equity as an equitable assignment of a future interest, and, upon the expectancy being converted into a vested interest, will be enforced by courts of equity. Such an assignment was enforced by this court against an attaching creditor; the court saying that "the question was too well settled to require or even allow debate at this day." Fitzgerald v. Vestal, 4 Sneed (Tenn.) 257. The fact that such sales or assignments will be closely scrutinized by courts to prevent frauds upon expectant heirs or persons in necessitous circumstances does not at all affect the power of the courts to give effect to such sales when fairly made and for full consideration. * * *

CLENDENING v. WYATT.

1895. 54 Kan. 523, 38 Pac. 792.

JOHNSTON, J.—The questions in this case are whether an expectancy of an heir to his ancestor's estate may be assigned, and, if so, whether the contract above set forth is effectual for that purpose. It is the general rule that an assignment at law will not be sustained unless the subject-matter has an actual or potential existence when the assignment is made; but it appears to be well settled that an expectancy of an heir in an ancestor's estate may become the subject of contract, and may be assigned in equity. Courts of equity will uphold such an agreement of an heir apparent, where it is fairly made, and for an adequate consideration. If no unjust advantage is taken of the indiscretion or necessities of the heir, and if the agreement is not unconscionable, and is not obtained by fraud or oppres-

sion, it may be enforced in equity after the death of the ancestor. Steele v. Frierson, 85 Tenn. 430, 3 S. W. 649; Story Eq. Jur., § 1040; Pom. Eq. Jur., §§ 1287, 1288; 1 Am. & Eng. Ency. Law 830, and cases cited. In the present case, it does not appear that there was any unfairness or fraud in the transaction. There is no suggestion that the consideration is inadequate, nor that any unjust advantage was taken of John Clendening. Indeed, it was not charged or shown that there was any misrepresentation, unfairness, oppression, or insufficient consideration. John Clendening, who executed the writing, had evidently reached years of maturity, as he was a married man, whose wife joined him in the execution of the contract. * * *

BACON v. BONHAM.

1881. 33 N. J. Eq. 614.

PARKER, J.— * * * The contention of the appellant is, that the assignment is not valid, because the legacy it purports to transfer was, at the time, a mere expectancy, and not the subject of assignment, and this is the question for decision in this cause.

Courts of equity give effect to assignments of contingent interests and expectancies. A contingent legacy may become the subject of assignment or contract of sale.

Even a naked possibility, or expectancy of an heir to his ancestor's estate, may become the subject of a contract of sale, if made *bona fide* for a valuable consideration, and will be enforced in equity after the death of the ancestor. 2 Story's Eq. Jur., § 1040; see, also, note in 2 Story's Eq., under § 1040; Spence's Eq. Jur., § 252, etc.

It is incumbent upon the party dealing with the heir, or expectant, to show affirmatively that there was no fraud, and that an adequate consideration was paid. 1 Story's Eq. Jur., § 336. * * *

In Cook v. Field, 15 Q. B. 460, it was held that an agreement in writing reciting that A was expecting to become seized in fee of an estate, on the death of S., as devisee under her will and contracting to sell all the possibility and expectancy of A in the estate, was not illegal nor contravening public policy.

Under authority of the cases cited, the right of Elisha Bonham, by means of the assignment to him of the proceeds of the expected legacy given to Belford Bonham, was perfect at the time of filing the bill in this cause. A valuable consideration had been paid by him; it appears, affirmatively, that there was no fraud, the testator was dead, the proceeds of the legacy had been reduced to the possession of the assignee; and further, it is proved that after the death of the testator, the precedent contract of assignment was confirmed by the assignor, in directing the paper recorded. * * *

CHAPTER VI

LEGALITY OF OBJECT.

§ 62.—General Rule.

HUNT ET AL. v. KNICKERBACKER.

1810. 5 Johns. (N. Y.) 327.

THOMPSON, J.— * * * It is a general rule of law, that all contracts or agreements which have for their object anything which is repugnant to the general policy of the common law, or contrary to the provisions of any statute, are void (1 Comyn on Con. 30) and not to be enforced. In the case of Holman v. Johnson (Cowp. 343), Lord Mansfield says, the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not, however, for his sake that the objection is ever allowed, but it is founded in general principles of policy; and whenever, from the plaintiff's own stating, or otherwise, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted. The same principle has been fully recognized by this court, in the case of Belding v. Pitkin (2 Caines (N. Y.) 149). It is there said to be a principle too salutary and well settled, to be in any measure infringed, that courts of justice ought not to assist an illegal transaction in any respect. It is considered in the English courts to be illegal, if not immoral, in the subjects of one country to enter into a contract with the subjects of another, to assist the latter in defrauding the revenue laws of his country (5 Term Rep. 600); and they will not sustain actions upon contracts entered into with that view. A contract which, in its execution, contravenes the policy and spirit of a statute, is equally void, as if made against its positive provisions. (3 Term Rep. 23.) * * *

McMULLEN v. HOFFMAN.

1899. 174 U. S. 639.

PECKHAM, J.— * * * There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the

same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* About the earliest illustration of this doctrine is almost traditional in the famous case of The Highwayman. It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. 1 Lindley Partnership (5th ed.) 94, note n; 9 Law Quarterly Review (London), pp. 105-197.

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way toward carrying out the terms of an illegal contract. In case any action is brought on which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *potior est conditio defendentis.* * * *

PENN v. BORNMAN.

1882. 102 Ill. 523.

MULKEY, J.— * * * In 2 Parsons on Contracts, p. 186, the author, in discussing the illegality of a contract as a defense, says: "That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may be regarded as an impossibility by act of law, for it would be absurd to punish a man for not doing, or, in other words, to require him to do, that which it forbids his doing." Strictly speaking, there can be no such a thing as an illegal contract. Viewed from a purely legal aspect, it is manifestly a contradiction of terms, for it is an elementary and fundamental principle of the law of contracts that the agreement between the parties must be one which the law permits to be made, or, in other words, it must be a lawful agreement. Bish. on Cont., § 458.

Anson, in his work on Contracts, p. 144, says: "A statute may render an agreement illegal in one of two ways,—by express prohibition, or by penalty. It may say, in so many words, that contracts of a certain sort are illegal or void, or both, and where it thus expressly avoids a contract, or makes it illegal, no doubt can arise as to the intention of the legislature." The case in hand falls within

the first class mentioned by this author. It is illegal by reason of being expressly prohibited, and therefore leaving no question as to the intention of the legislature. * * *

In 5 Robinson's Practice, p. 398, the author says: "It is clear no right of action can spring out of an illegal contract,—that no action will lie upon a contract made in violation of a statute, or of a principle of the common law."

The distinction in some of the old cases between *malum prohibitum* and *malum in se,* has long since been exploded, both in this country and England. Cannon v. Bryce, 3 Barn, & Ald. 179 (5 Eng. C. L.); Aubert v. Maze, 2 Bos. & Pul. 371; Bank of United States v. Owens, 2 Pet. (U. S.) 539. In the latter case it is said by Johnson, J.: "There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

In 7 Wait's Actions and Defences, p. 64, it is said: "The rule is now well established that no agreement to do an act forbidden by statute, or to omit to do an act enjoined by statute, is binding," citing De Begins v. Armistead, 10 Bing. 110; Cope v. Rowlands, 2 Mees. & W. 153; D' Allex v. Jones, 37 Eng. L. & Eq. 476; Clark v. Protection Ins. Co., 1 Story's C. C. 109; Kottwitz v. Alexander, 34 Tex. 689; Coburn v. Odell, 30 N. H. 540; Milton v. Hoden, 32 Ala. 30; McWilliams v. Phillips, 51 Miss. 196; Hooker v. De Palos, 28 Ohio St. 251; Durgin v. Dyer, 68 Me. 143. Upon this general proposition the authorities might be multiplied almost indefinitely.

Linn v. State Bank of Illinois, 1 Scam. (Ill.) 87, was an action of debt, brought by the bank against Linn, upon a note given by him to the bank in consideration of a loan of its notes or bills, which had been issued and emitted, under its charter, in contravention of the 10th section of article 1 of the constitution of the United States, and it was held there could be no recovery. Here, the illegal act was prohibited by a constitutional provision, but there is no difference in this respect between a statutory and constitutional prohibition, provided the legislature acts within the scope of its authority.

Nash v. Monheimer, 20 Ill. 215, was an action brought on a wager upon the speed of a certain horse, which was tested in presence of the parties within the corporate limits of a city, and it was held there could be no recovery, on the grounds the trial of the speed of the horse within the corporate limits of the city was forbidden by ordinance. In this case the court, referring approvingly to Armstrong v. Taylor, 11 Wheat. (U. S.) 258, says: "And the rule was laid down by the supreme court of the United States, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid for its enforcement. * * *

POPE v. HANKE.

1894. 155 Ill. 617, 40 N. E. 839.

THIS was an action upon promissory note executed in Missouri for differences on the settlement of option contracts such as the statutes of Illinois declare "shall be considered gambling contracts."

MAGRUDER, J.— * * * The general rule is, that the validity of a contract is to be governed by the law of the place where it is made (Phinney v. Baldwin, 16 Ill. 108; Mumford v. Canty, 50 *id.* 370); and in the applicatiton of this principle to notes, it is held that the laws of the state where a note is made will govern as to the defenses, which can be set up against a recovery thereon. (Evans v. Anderson, 78 Ill. 558; Anstedt v. Sutter, 30 *id.* 164; Yeatman v. Cullen, 5 Blackf. (Ind.) 240; Trimbey v. Vignier, 1 Bingham's New Cases, 151; Woodruff v. Hill, 116 Mass. 310.)

While it is true, however, that one state or nation will recognize and execute the laws of another through comity, yet the principle of comity does not permit the enforcement of foreign laws, which are prejudicial to the interest of the state where they are sought to be enforced. A contract made in one state will not be enforced in another, when to do so would contravene the criminal laws of the latter state, or would be against the express prohibition of its laws. Comity between different states does not require a law of one state to be executed in another when it would be against the public policy of the latter state. No state is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws. (Mumford v. Canty, *supra;* Story on Conflict of Laws, § 327; Faulkner v. Hyman, 142 Mass. 53; Hill v. Spear, 50 N. H. 253; Fisher v. Lord, 63 *id.* 514.) * * *

We held in Chapin v. Dake, 57 Ill. 295, that a draft assigned in payment of a gambling debt was void in the hands of a subsequent *bona fide* holder. In Tenney v. Foote, 4 Bradw. (Ill.) 594, it was held, that the notes described in § 131, ch. 30, included notes the consideration of which, in whole or in part, arose out of the gambling transactions mentioned in § 130; and that a note, given for such differences as are hereinbefore described, was void under § 131. The opinion of the Appellate Court in Tenney v. Foote, *supra,* was approved by this court in Tenney v. Foote, 95 Ill. 99, and the latter case has been since approved in Pearce v. Foote, 113 Ill. 228. (See also Cothran v. Ellis, 125 Ill. 496; Soby v. The People, 134 *id.* 66.)

It thus appears, that, under the statutes of this state and the decisions construing them, the notes sued on are absolutely void. The contracts, upon which they are based, are declared to be gambling contracts, and void. The transactions, in which they have their origin, are prohibited by the criminal code of the state; and those engaging in them are subject to punishment by fine or imprison-

ment. We have held, that dealing in futures or options is productive of mischievous results, and have characterized it as a "dangerous evil," and "a vice that has in recent years grown to enormous proportions." (Pearce v. Foote, *supra.*) We have also said, that such dealing "is not only contrary to public policy, but it is a crime —a crime against the state, a crime against religion and morality, and a crime against all legitimate trade and business," and that there is demanded "at the hands of the courts of the country a faithful and rigid enforcement of the laws, which have been ordained for the suppression of this gigantic evil and blighting curse." (Cothran v. Ellis et al., *supra.*)

In view of the character of the transactions here involved as thus characterized, we think that our own law should be applied in determining whether a recovery should be had in this suit; and that comity does not require us to ignore the statute of Illinois, under which these notes are void even in the hands of an innocent holder, in order to permit a defense which would be allowed under the law of a foreign state. The enforcement of such foreign law would contravene the criminal code of this state, and would be in opposition to its public policy, and to the express prohibition of its statutory enactments, and would be prejudicial to the interests of its people. We are, therefore, inclined to hold that no recovery can be had upon the notes, and that the rulings of the Circuit Court were correct.

The judgments of the Circuit and Appellate Courts are accordingly affirmed.

Judgment affirmed.

ATKINS v. JOHNSON.

1870. 43 Vt. 78.

PIERPOINT, C. J.— * * * The plaintiff is here seeking to compel the defendant to indemnify him for the damage which he has sustained, in consequence of publishing a libel, at the request of the defendant, and from the consequences of which the defendant agreed to save him harmless.

The question is, whether such an agreement as the plaintiff sets out in his declaration can be legally enforced.

The general principle, that there can be no contribution or indemnity, as between joint wrong-doers, is too well settled to require either argument or authority.

To this rule there are many exceptions, and prominent among them is the class of cases where questions arise between different parties, as to the ownership of property, and a third person, supposing one party to be in the right, upon the request and under the authority of such party, does acts that are legal in themselves, but

which prove in the end to be in violation of the rights of the other party, and he, in consequence thereof, is made liable in damages. If in such case there was a promise of indemnity, the law will enforce it, and if there was not, if the circumstances will warrant it, the law will imply a promise of indemnity, and enforce that. Of this class are most of the cases cited and relied upon by the counsel for the plaintiff. * * *

In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known. The publication not only subjects the party publishing to a prosecution by the person injured for damages, but also to a public prosecution by indictment. In either case, all that would be required of the prosecutor would be to prove the publication by the party charged. The law in such case presumes malice and damage, and the prosecutor would be entitled to a judgment, unless the party charged could introduce something by way of defense that would have the effect to discharge him from legal liability; failing in that, the party would be made liable upon a simple state of facts, all of which he perfectly understood at the time he commenced his unjustifiable attack.

In this case, both these parties knew that they were arranging for and consummating an illegal act, one that subjects them to legal liability, hoping, to be sure, that they might defend it; but the plaintiff, fearing they might not be able to do so, sought to protect himself from the consequences, by taking a contract of indemnity from the defendant. To say under such circumstances that these parties were not joint wrong-doers, within the full spirit and meaning of the general rule, would be an entire perversion of the plainest and simplest proposition. This being so, the law will not interfere in aid of either. It will not inquire which of the two are most in the wrong, with a view of adjusting the equities between them, but regarding both as having been understandingly engaged in a violation of the law, it will leave them as it finds them, to adjust their differences between themselves, as they best may. * * *

NEWELL v. HIGGINS.

1893. 55 Minn. 82, 56 N. W. 577.

GILFILLAN, C. J.—One Peterson was indebted to the plaintiff's firm, Geo. R. Newell & Co., and also to various other persons, and Peterson and various of his creditors, including plaintiff's firm, executed a composition agreement by which that firm agreed to accept a conveyance of certain real estate in full of its claim, another

creditor agreed to accept a conveyance of certain other real estate in full of the debt due it, and each of the other creditors agreed to accept 50 per cent. of his or their respective claims in full thereof. This agreement was carried out. Before signing the agreement it was agreed orally between Peterson and said firm that, in consideration of the firm signing the agreement, Peterson should (in addition to the conveyance of real estate as mentioned in the agreement) execute to plaintiff four promissory notes for $500 each, two of them to be indorsed by this defendant, and the notes were so executed and indorsed. Several of the creditors signed the composition agreement after it was signed by plaintiff's firm. The oral agreement was to be kept secret from the other signing creditors, and it was never known to them. This action is to recover upon the two notes so executed and indorsed by defendant.

A composition agreement is an exception to the rule that payment of part of a liquidated and due debt is not satisfaction for the whole. It is excepted because there is a consideration to each creditor for his agreement to accept less than his claim in full payment. The composition is regarded as an agreement, not merely between the debtor and each creditor, but also between the several creditors. The engagement of each creditor to accept less than his claim is the consideration to each of the others for his like engagement. Each creditor signing has a right to assume that each one is to receive the benefit stipulated in the agreement; that it sets forth truly the terms of composition as to all the parties. Any separate agreement by which one of the creditors secures to himself benefits not conferred on the others, and which agreement is not disclosed to them before they sign the composition, is a fraud upon them. Such separate agreement is void. It is claimed, however, that, in analogy to cases of conveyances and transfers made to defraud creditors, the agreement is valid between the parties to it, and void in favor only of those sought to be defrauded, to wit, the creditors. The decisions are uniform that the agreement is void as to all parties. See 3 Amer. & Eng. Enc. Law, pp. 396, 398, and cases cited in notes 5 and 3, especially Howden v. Haigh, 11 Adol. & E. 1033; Atkinson v. Denby, 7 Hurl. & N. 933; Case v. Gerrish, 15 Pick. (Mass.) 49; Ramsdell v. Edgarton, 8 Met. (Mass.) 227; Harvey v. Hunt, 119 Mass. 279; Fay v. Fay, 121 Mass. 561; Wiggin v. Bush, 12 Johns. (N. Y.) 305; Lawrence v. Clark, 36 N. Y. 128; Patterson v. Boehm, 4 Pa. St. 507; Lee v. Selers, *81 Pa. St. 473. We have not found any case in which such secret agreement was sustained. * * *

HEFTER ET AL. v. CAHN ET AL.

1874. 73 Ill. 296.

CRAIG, J.— * * * In effecting a composition agreement, the policy of the law demands the utmost good faith on the part of the debtor. He cannot be permitted, by pretending to be insolvent, to induce a creditor to accept one-half of a debt in lieu of the whole, when, in fact, his property is ample to pay the creditor in full.

Good faith requires of the debtor, before he shall be permitted to profit by a composition agreement, that he shall make a full and fair statement of his effects, or that no concealment, deception or fraud should be practiced. Leving v. Gale, 28 Ind. 486.

But, independent of this question, it appears, from the evidence, that Leopold, Kuh & Co. were creditors of appellees in the sum of $677. Livingston, the agent, endeavored to induce them to settle for 50 cents on the dollar, and sign the composition agreement. This they refused to do. Livingston then sent one Jacob Frost to Leopold, Kuh & Co., and he gave his own note to them for 50 per cent. of their debt, payable in one year. They then signed the composition agreement, and in that manner obtained the other 50 per cent. of their debt in the same manner as the other creditors. The note given by Frost, he paid at maturity, and Livingston reimbursed him out of his own funds.

By this secret agreement, one creditor obtained an undue advantage, and, by executing the composition agreement, the other innocent creditors were decoyed into the contract, which they had every reason to believe and suppose to be founded upon the basis of entire equality.

It seems to be well settled by the authorities, that such secret arrangements are utterly void, and ought not to be enforced, even against the assenting debtor. 1 Story's Eq. Jurisprudence, § 379, and note; Wiggin v. Bush, 12 Johns. (N. Y.) 305.

Story, in the section cited *supra,* says: "Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy."

If, then, a secret agreement made with one of the creditors is void, and contrary to public policy, does justice or honesty require that a composition agreement should be binding upon a creditor who is induced to become a party thereto under the belief that all the creditotrs are to be paid *pro rata,* when, in fact, one of them has a secret contract from the debtor by which he is to be paid in full, or have an undue advantage over the others? We cannot give our sanction to a doctrine so unjust as this.

When a composition agreement is executed, the debtor professes

and holds out to deal with all the creditors who enter into it, on terms of perfect equality, when, if, at the same time, he has a secret agreement with one of the creditors, which gives him an undue advantage, this is a fraud upon the others, and a contract thus obtained cannot be said to be fairly made, but is tainted with fraud, and a fraudulent contract will not support an action, neither can it be made the foundation for a defense.

In the case of Spooner v. Whiston, 17 English Common Law, 580, which was a case where the same principle arose as in this case, Mr. Justice Burrough said: "By the terms of this deed, all the defendant's creditors should have signed it, or acquiesced with the terms therein contained, and it appears that one of them, instead of so doing, received a certain sum of money in satisfaction of his demand on the defendant, without coming in or even deferring to the terms of the deed. This was clearly a fraud on the general creditors, and therefore there is no pretense or color for saying that the plaintiff is bound by the terms of the deed, although he had executed it, by which he merely agreed to put himself on the same footing with the other creditors."

In the case of Kuhn v. Gumberts, 9 Ind. 430, which is a case, in its facts, very similar to the one under consideration, the court, in deciding the case, said: "It has been repeatedly decided that, if a creditor signs a composition deed, and thereby induces others to sign it, makes a private bargain with the debtor, the effect of which is, to place himself in a better situation than the other creditors, he thereby commits a fraud upon them, and the bargain is void. But the question to settle in this case is, does such bargain render the composition itself void, so as to enable a creditor, who signed it in good faith, to recover his original demand? In transactions between a debtor and his creditors, which result in a deed of composition, the utmost good faith is required. The debtor professes to deal upon equal terms with all creditors who enter into the settlement, and they are supposed to stand in the same situation. This, then, being the principle upon which the compromise rests, it would seem to follow, that the debtor, when he induces one creditor to assent to the arrangement, by giving him a secret preference over other creditors, is guilty of a fraud in obtaining the composition deed, because it must be presumed that such other creditors, had they known of such secret preference, would not have assented to the composition; and it may be stated, as a general rule, that an agreement cannot be made the subject of an action, or set up as a defense, if it can be impeached on the ground of dishonesty, or as being against public policy." See also, Leving v. Gale, 28 Ind. 486.

It is, however, insisted by appellants that appellees cannot recover upon the original account until they have rescinded the composition agreement by returning, or offering to return, what they received under it.

We do not think the doctrine of rescission of contracts will apply to a case of this character.

If the composition agreement was fraudulent, that rendered it void, and appellees had the right to sue on their original account. Whatever amount had been received, would be applied as a credit on the account. It would be unreasonable to require them, in case they had received one-half of their debt, to return the half received, and then immediately sue and recover it back again. A rule of that character would neither be just nor reasonable. Pierce v. Wood, 3 Foster 519 (23 N. H.); Reyndes v. French, 8 Vt. 85. * * *

HUCKINS v. HUNT.

1885. 138 Mass. 366.

CONTRACT in two counts. The first count was upon a negotiable promissory note for $217.50, given to the plaintiff by the defendant; the second count was for a like amount, upon an account annexed, for goods sold and delivered by the plaintiff to the defendant before the making of the note. The case was submitted to the superior court, and, after judgment for the defendant, to this court, an appeal, upon agreed facts, the material parts of which appear in the opinion.

MORTON, C. J.—The plaintiff does not contend that he is entitled to recover upon the note upon which his first count is founded. The note was given in consideration, and upon the secret agreement, that the plaintiff should execute a deed of composition entered into between the defendant and his creditors, which purported to treat all the creditors equally. The decisions are numerous and uniform that such a note is void. Harvey v. Hunt, 119 Mass. 279, and cases cited.

But he contends that he is entitled to recover the balance of his account, for which the note was given, in the same manner as if he had not executed the composition deed. In other words, his claim is that the law will regard the rights of the parties as if the composition deed and the corrupt agreement by which it was accompanied had never been made.

We do not understand this to be the law. If two persons make an illegal contract, being *in pari delicto,* so long as it remains executory, the law will not aid either party to enforce it; but, so far as it is executed, the law will not lend its aid to either party to relieve him from the consequences of the illegal contract, or to rescind it. Myers v. Meinrath, 101 Mass. 366. Horton v. Buffinton, 105 Mass. 399; Cranson v. Goss, 107 Mass. 439.

In the case at bar, the plaintiff executed the composition deed and received the amount provided for therein in full satisfaction and payment of his account. This operated as an extinguishment of his

debt. The agreement with the defendant that he would pay the full amount of the debt in the future was illegal, and avoided the composition deed as to the other creditors. Partridge v. Messer, 14 Gray (Mass.) 180. But the plaintiff was bound by it, and cannot set up his own illegality to relieve himself from its consequences.

His debt has been discharged and extinguished, and the law leaves the parties in the position in which they have placed themselves, and will not furnish a remedy to either, to undo what has been done. Mallaieu v. Hodgson, 16 Q. B. 689.

Judgment for the defendant.

BRADY ET AL. v. HUBER.

1902. 197 Ill. 291, 64 N. E. 264.

BOGGS, J.— * * * It is a rule having universal recognition, that though creditors of a fraudulent grantor may invoke the aid of the courts to have a conveyance made for the purpose of hindering and delaying them in the collection of their demands declared inoperative as against their rights and interests, the law will not provide a remedy which either of the guilty parties, if *in pari delicto,* can avail of against the other, either to disturb or enforce the conveyance. A court of equity will not lend its aid to the grantor to cancel the deed, or reform it so as to show the verbal contract of the grantee, or to enforce any agreement to re-convey, or declare that any trust or confidence has grown out of the conveyance. (McElroy v. Hiner, 133 Ill. 156; 14 Am. & Eng. Ency. of Law (2d ed.) 278.) Nor will a court of law entertain a legal action brought by the fraudulent grantee against the grantor to recover possession of the property so fraudulently conveyed. (Kirkpatrick v. Clark, 132 Ill. 342.) The law, in such cases, refuses to aid either party, but leaves them where it finds them. * * *

JEROME v. BIGELOW.

1872. 66 Ill. 452.

SCOTT, J.—This bill was for an injunction and relief. The parties are physicians, and were practicing their profession as specialists in the city of Chicago.

The decision of the case turns upon the construction that shall be given to the contract of the 10th of May, 1870, and the supplemental agreement.

The substance of the agreement is, that appellant should take possession of the office theretofore occupied by appellee, with everything belonging to it, and by the express terms of the contract, he was authorized and licensed to carry on and conduct the business of a doctor of medicine in the special departments thereof in which appellee had previously been engaged, in all its branches at his discretion, in the same office, in the name and under the patronage and good will of appellee, from the 10th day of July, 1870, for and during the period of ten years next thereafter, in consideration of which appellant was to pay appellee the sum of $4,000 per annum, in semi-annual payments, until the sum of $40,000 should have been paid.

The construction given to the contract by the counsel for appellant, is, that by its terms appellant was licensed to practice medicine in the name of appellee, to personate him when applied to by patients requiring medical treatment, and to prescribe for them in his name; that he was not bound to explain to such persons that he was not, in fact, appellee. It is said that "it was perfectly natural he should be called for and addressed" by the title of appellee. It is not denied that he was applied to by persons in need of medical assistance under the belief that he was appellee; that he represented himself to them as such and accordingly treated them.

Assuming this to be the true construction of the contract, we have no hesitation in pronouncing it contrary to public policy.

It may be that appellant is as good a physician as appellee, and quite as skillful in the treatment of disease. But that is not the question. Persons in need of medical aid are entitled to the physician of their choice, and he who personates another in that regard and thus imposes on that unfortunate class of persons commits a great wrong. A contract that licenses and permits such practices, is absolutely vicious, and a court of equity will never enforce it. It may have been, in this case, that persons living at a distance, who may have heard that appellee possessed some skill in the treatment of certain diseases, applied to him for medical advice, and would not get it, but would get that of another physician of whom they had never heard. It is a proposition too plain for argument, that through such a contract the public might be grossly imposed upon. If it were possible for an eminent physician, celebrated throughout the country for his great skill and experience in the treatment of disease, to make such a contract with an inexperienced physician, it would impose upon an unfortunate class of persons a most cruel and iniquitous deception. It would hardly be possible to conceive what sort of a contract would be more mischievous in its tendencies or cruel in its practical results.

It is immaterial what may be the relative medical attainments of these parties. The principle would be the same, whether their attainments and skill in treatment of disease were equal or unequal. No man has the right to sell his reputation or skill in any profession,

whatever it may be, and thus enable an unknown party to perpetrate a fraud upon the public in his name.

This is not a case of a sale of the good will of a business that can be as well transacted by one person as another; and the cases cited by counsel, supposed to be illustrative of the principles that govern such cases, can have no application. It is not possible to assimilate the case under consideration to a case of the sale of the good will of a business, and maintain it on that ground. The one is lawful and the other is unlawful.

The principles of the following cases, in some degree, elucidate the case at bar: Bell v. Locke, 8 Paige (N. Y.) 74; Taylor v. Carpenter, 11 Paige (N. Y.) 299; Bloss & Adams v. Bloomer, 23 Barb. (N. Y.) 604; Cornelius v. Walsh, Breese (Ill.) 98.

Both parties are equally involved in the turpitude of this transaction. The law will not assist either, but will leave them to the consequences of their own contract.

The bill was properly dismissed, and the decree is affirmed.

Decree affirmed.

MANHATTAN MEDICINE CO. v. WOOD.

1883. 108 U. S. 218.

FIELD, J.— * * * A court of equity will extend no aid to sustain a claim to a trade-mark of an article, which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine.

It is admitted that whatever value the medicine possesses was given to it by its original manufacturer, Moses Atwood. He lived in Georgetown, Massachusetts. He manufactured the medicine there. He sold it with the designation that it was his preparation, "Atwood's Vegetable Physical Jaundice Bitters," and was manufactured there by him. As the medicine was tried and proved to be useful, it was sought for under that designation, and that purchasers might not be misled, it was always accompanied with a label, showing by whom and at what place it was prepared. These statements were deemed important in promoting the use of the article and its sale, or they would not have been continued by the assignees of the original inventor. And yet they could not be used with any honest purpose when both statements had ceased to be true. It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company in the city of New York.

Any one has an unquestionable right to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them from articles of the same general character manufactured or sold by others. He may thus notify the public of the origin of the article and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded not only as a matter of justice to him, but to prevent imposition upon the public. Mfg. Co. v. Trainor, 101 U. S. 54.

The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix, to goods of his own manufacture, signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance. * * *

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§ 63.—Prohibition Express or Implied.

STEVENSON v. EWING.

1888. 87 Tenn. 46, 9 S. W. 230.

CALDWELL, J.—Ewing was a real estate broker, doing business in Chattanooga, claiming to have sold a house and lot for Stevenson. He brought this action before a justice of the peace, to recover a sum alleged to be due him as commissions for the sale. The case was appealed to the circuit court, and there tried. Verdict and judg-

ment were in Ewing's favor for $200. Stevenson has appealed in error to this court. In the court below it was contended by Stevenson that Ewing had not paid the privilege tax and procured the license required by statute of persons pursuing his avocation, and that for that reason this suit could not be maintained. The evidence tended to show that Ewing had not paid the tax and taken out license at the time he claimed to have made the sale. But the trial judge, not agreeing with the defendant as to the law applicable, instructed the jury that the failure of Ewing to pay the tax and procure the license, if established, would not defeat this action. This instruction is assigned as error.

The sale for the making of which Ewing claims commissions was made, if made at all, in February, 1887. The act of 1885, then in force, declares that the occupation of a real estate broker "shall be deemed a privilege and be taxed, and not pursued or done without license." Acts 1885, c. 1, § 46. Here is an express prohibition of all unlicensed persons to act as real estate brokers, and, consequently, as a prohibition by necessary inference of all contracts which such person shall make for compensation to themselves for so acting. By the clear and unambiguous terms of the statute the real estate broker is forbidden to pursue his business without license, and it follows that if he presumes to do so his acts are in violation of law, and all contracts for his benefit are illegal and void. If he fails to equip himself with the required authority for the transaction of his business, the law will deny him its aid when he seeks to enforce his contract for commissions. We confine this holding, however, to the unlicensed broker's contract with his principal, and do not extend it to the independent contract made between vendor and vendee whom he brings together. Judge Cooley says: "When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it." Cooley, Tax'n (2d ed.) 572.

It is familiar law, both in England and America, that a contract prohibited either expressly or impliedly by statute is illegal, and cannot be enforced. Perkins v. Watson, 2 Baxt. (Tenn.) 187; Insurance Co. v. Insurance Co., 11 Humph. (Tenn.) 11; Hale v. Henderson, 4 Humph. (Tenn.) 200; 2 Benj. Sales (4th Amer. ed.), §§ 818, 825; 1 Add. Cont., § 294; Holt v. Green, 73 Pa. St. 198; Dillon v. Allen, 46 Iowa 299; McConnell v. Kitchens, 20 S. Car. 430; Woods v. Armstrong, 54 Ala. 150; Johnson v. Hulings, 103 Pa. St. 498.

It is earnestly insisted by learned counsel for Ewing that the sole purpose of the act under consideration is to raise and secure the col-

lection of revenue, and not to prevent the business of real estate brokers, as being against good morals or contrary to public policy; and that, such being the purpose of the act, the courts should construe it so as not to affect the validity of the contracts of such brokers, though made without license. The rule of construction thus insisted upon is sound and well recognized. But there is no room for its application in this case. It is called into requisition by the courts only when there is doubt, from the language of the statute, itself, whether or not the legislature intended to prohibit the exercise of the privilege without license. We have already seen that no such doubt exists with respect to the language of the act before us. The prohibition is distinct and absolute. That ends all construction. * * *

Reversed and remanded.

EATON v. KEGAN.

1874. 114 Mass. 433.

ENDICOTT, J.— * * * By Gen. Sts. c. 49, § 63, in all contracts for the sale and delivery of oats and meal, "the same shall be bargained for and sold by the bushel." Section 64 provides that a bushel of oats shall be thirty-two pounds, and a bushel of meal fifty pounds. The statute does not in terms prohibit other sales, or attach a penalty to the violation of this provision. But it does in terms direct and prescribe in what mode the contract for the sale and delivery of oats and meal shall be made: that they shall be bargained for and sold by the bushel. Not following this direction is equivalent to disobeying a prohibition. Miller v. Post, 1 Allen (Mass.) 434. This form of contract is enacted for the benefit of the buyer, and is the legal mode of selling such commodities. The case finds that the plaintiff did not follow the direction of the statute in his sales. Having bought meal and oats himself by the bag, without opening or weighing he sold them to the defendant. The mode of sale being prescribed, it was illegal to disregard it, and he cannot recover for the articles so sold.

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§ 64.—Effect of Penalty Imposed by Statute.

RANDALL v. TUELL.

1897. 89 Me. 443, 36 Atl. 910.

ACTION by James P. Randall against James E. Tuell. Judgment for plaintiff and defendant excepts.

FOSTER, J.—The only question presented in this case is whether

an innholder, who has no license, under Rev. St. c. 27, can recover for board and lodging furnished by him in such inn.

While the statute contains no express provision declaring contracts by an unlicensed innholder to be void, it does, by § 13, expressly provide that "no person shall be a common innholder or victualer without a license, under a penalty of not more than fifty dollars."

It is the general doctrine, now settled by the great weight of authority, that where a license is required for the protection of the public, and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void.

Did the legislature, by the requirement of a license, intend to prohibit the exercise of the business without a license, or was the statute enacted for revenue purposes only?

It can hardly be contended that the statute is in any sense for mere revenue. The fee required is only one dollar. The license must show that he is a man of good moral character, must give bond not to violate the prohibitory law, and must allow no gambling on his premises. The legislative intent is best inferred from the language of the statute itself. The statute is explicitly prohibitory, and the license required is clearly for the protection of the public, and to prevent improper persons from engaging in a particular business.

This question has come before the courts not only in this, but in other states, and the great trend of authority is in but one direction. The same principle was established in Harding v. Hagar, 60 Me. 340. There the plaintiff was a commercial broker, within the meaning of a statute of the United States, which provided that no person should be engaged in prosecuting or carrying on any trade, business, or profession thereinafter mentioned until he should obtain a license therefor, under a penalty. That statute contained no express provision declaring the contracts of unlicensed persons void. Like the statute under consideration, it prohibited unlicensed employments. Suit was brought to recover for services as broker, and in the course of the opinion Kent, J., says: "It is too well settled to require the citation of authorities that no party can recover for acts or services done in direct contravention of an express statute, or for property sold and delivered. When the case develops such forbidden acts, unless protected by a license or authority, it is incumbent on the plaintiff to show such license. * * *

A contract for shingles not surveyed as required by law was held void in Richmond v. Foss, 77 Me. 590, 1 Atl. 830, although the statute contained no express prohibition.

In Cope v. Rowland, 2 Mees. & W. 149, it was held that a person acting as a broker without license could not recover his commissions, where the statute required a license, and imposed a penalty for its violation. "It is perfectly settled," says Baron Parke, "that where the contract which the plaintiff seeks to enforce, be it express or im-

plied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."

In Massachusetts the decisions are numerous that where a statute imposes a penalty for a failure to comply with its provisions, it is to be construed as prohibitory, and that contracts made in direct contravention of its requirements are unlawful and void. Miller v. Post, 1 Allen (Mass.) 434—where milk was sold by the can, and the cans were not sealed; Libby v. Downey, 5 Allen (Mass.) 299—where coal was sold without being weighed by a sworn weigher; Sawyer v. Smith, 109 Mass. 220—hay sold without being weighed as required by statute; Prescott v. Battersby, 119 Mass. 285—lumber sold without being properly surveyed.

The same doctrine was affirmed in Illinois in Hustis v. Picklands, 27 Ill. App. 270, where, under a statute making it unlawful for persons to exercise the business of brokers without a license, it was held that one who sold stocks without a license could not maintain an action for his commissions. And also in Tedrick v. Hiner, 61 Ill. 189.

Also in Pennsylvania, in Johnson v. Hulings, 103 Pa. St. 498; Holt v. Green, 73 Pa. St. 198.

In California, where it is made a misdemeanor for a person to practice medicine without a license, an action will not lie to recover for services so rendered. Gardner v. Taturn, 81 Cal. 370, 22 Pac. 880.

In Tennessee the court say that the revenue test is to be applied only where there is doubt from the language of the statute itself whether or not the legislature intended to prohibit the exercise of the privilege without a license, and that under a statute providing that the business of a real estate broker shall not be pursued without a license it was held that an unlicensed broker could not recover his commission. Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230.

If the statute in question was enacted for revenue purposes only, instead of being prohibitory, the plaintiff might properly recover. But we are satisfied that such was not the intention of the legislature. The statute being by implication prohibitory by reason of the penalty attached, the plaintiff is precluded from recovering. Basing his action upon a clear violation of the statute, he cannot successfully invoke the aid of the court. Miller v. Post, 1 Allen (Mass.) 434.

Exceptions sustained.

MANDLEBAUM v. GREGOVICH.

1882. 17 Nev. 87, 28 Pac. 121.

HAWLEY, J.—The only question to be determined in this case is whether or not a traveling merchant who has sold goods, wares, and merchandise without having procured the license required by section 67 of the revenue act can maintain an action to recover their value. This section provides that "every traveling merchant * * * selling or offering to sell any goods * * * shall pay for such license twenty-five dollars per month, * * * and it is hereby made the duty of * * * all peace officers to demand the license of any such * * * drummer or other person named herein; and, if such person be found not to have a license as required by law, the person so offering any goods, wares, or merchandise for sale shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than fifty nor more than five hundred dollars." St. 1877, p. 79. This section does not prohibit the sale of goods by any person who has failed to procure the license, but it imposes a penalty against every one who sells or offers for sale any goods, wares, and merchandise without having the license so to do. The penalty only attaches to the person who violates the provisions of the law. It does not affect the contract for the sale of goods. The fine is imposed, not for selling the goods, but for the failure to procure the license. Numerous authorities are cited by respondent's counsel which announce the general doctrine "that a penalty implies a prohibition, though there be no prohibitory words in the statute, and that an agreement in violation of the statute prohibiting or enjoining an act absolutely or only under a penalty cannot be enforced." This principle is applied in all cases where the subject-matter of the contract is forbidden by the statute (Brackett v. Hoyt, 29 N. H. 264; Williams v. Tappan, 23 N. H. 391; Bull v. Harragan, 17 B. Mon. (Ky.) 352; Ferdon v. Cunningham, 20 How. Pr. (N. Y.) 154; Best v. Bander, 29 How. Pr. (N. Y.) 492; Swords v. Owen, 43 How. Pr. (N. Y.) 176), or is in violation of a statute for the protection of the public against imposition or fraud (Woods v. Armstrong, 54 Ala. 154; Bensley v. Bignold, 5 Barn. & Ald. 335; D'Allex v. Jones, 37 Eng. Law & Eq. 475), or for the protection of the public health or morals (Griffith v. Wells, 3 Denio (N. Y.) 226), or where the contract is against public policy. * * * Bronson, C. J., in delivering the opinion of the court in Griffith v. Wells, *supra*, said: "When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be valid. * * * But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of

frauds by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be supported." The distinction in the application of the principles relied upon by respondent is stated in clear, plain, and explicit terms by the supreme court of Iowa in Dillon v. Allen: "The distinction between the cases may be made plain by a little further consideration. In the case before us the statute forbids the use of threshing-machines wanting in certain contrivances for the protection of those employed about them. The contract in this case was for the use of such a machine, and was performed by such use. The very act performed under the contract was forbidden by the statute, and the parties thereto were *in pari delicto*. In the other cases * * * the statute provides that any person who shall sell a town lot before the plat is recorded shall be subject to a prescribed penalty. The statute does not forbid selling the lots before the plat is recorded, but fixes a penalty against the owner of the land plotted for failing to record the plat. The sale is not unlawful; the *corpus delicto* prescribed in the statute is the omission to record the plat. The purchaser was guilty of no violation of law. The contract was not forbidden. It is therefore valid." 46 Iowa 302.

It is apparent, upon an examination of the revenue act, that the legislature did not intend to prohibit the sale of goods by a traveling merchant without a license, or to make such sales illegal. This was not the object, intent, or purpose of the law. A license is required and a penalty imposed upon local merchants and persons engaged in other business in the same manner as upon the traveling merchants. The legislature intended by section 67, as well as by other sections, to raise money for revenue purposes—to compel traveling merchants, as well as local merchants, to contribute to the revenue of the state for carrying on and conducting their business within this state. "The purpose," as was said by the court in Aiken v. Blaisdell, "was not to diminish, restrain, control, or regulate business. The transaction of all kinds of business was just as legal after the passage of the law as before. The law is strictly a revenue law, the sole object being to get money into the treasury, and that is accomplished by requiring all persons that engage in certain kinds of business to contribute a certain amount towards paying the liabilities of the government. Its object is to raise money, and not to regulate the business of the country. If a man engages in the kind of business referred to, he is engaged in a legal business, whether he has a license or not. If he has no license, he has no legal right to do it, and subjects himself to the penalty. The law, we think, was intended to operate upon the person, and not upon the business. If the object of the law had been to prohibit certain kinds of business, or to regulate it with a view to its effect upon public morals or public security, by limiting it in its extent, or the place where it is to be carried on, or the persons who shall conduct it, or otherwise,

in all such cases the law operates upon the business as well as the person. Revenue mainly in such cases is not the object; it is only incidental, or the means by which the law regulates and controls the business. The act in question imposes no restrictions upon the business. All are at liberty to engage therein, where and when and to any extent they choose, upon paying for the license." 41 Vt. 666. We are of opinion that the plaintiff is entitled to maintain this action for the value of the goods, wares, and merchandise sold and delivered to the defendant, notwithstanding the fact that at the time of the sale he had not procured the license required by section 67 of the revenue act. Drexler v. Tyrrell, 15 Nev. 136, 137; Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245; Hill v. Smith, Morris (Ia.) 75; Smith v. Mawhood, 14 Mees. & W. 452; Johnson v. Hudson, 11 East 180; Brown v. Duncan, 10 Barn. & C. 93; Witherell v. Jones, 3 Barn. & Adol. 222; Armstrong v. Toler, 11 Wheat. (U. S.) 260; Story, Cont., § 759, *et seq.* The court erred in declaring the contract for the sale of the goods illegal, and it also erred in dissolving the attachment. The judgment of the district court is reversed, and the cause remanded for a new trial.

MILLER v. AMMON.

1892. 145 U. S. 421.

AN ordinance of the city of Chicago imposed a penalty for the sale of spirituous liquors in quantities of one gallon or more at a time without a license. Plaintiff below sued in the circuit court of the United States for the purchase price of wines amounting to $5,287. Defendant below answered that the sale of the wine was in violation of the ordinance. Demurrer to answer was sustained and defendant electing to stand by his answer judgment was rendered against him. Writ of error.

BREWER, J.— * * * The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock, Principles of Contracts, pp. 253, 260; Penn v. Bornman, 102 Ill. 523; Alexander v. O'Donnell, 12 Kan. 608; Gunter v. Leckey, 30 Ala. 591; Kennedy v. Cochrane, 65 Me. 594; Bank of United States v. Owens, 27 U. S. 2 Pet. 527, 539; Pangborn v. Westlake, 36 Iowa 546, 549; Harris v. Runnels, 53 U. S. 12 How. 79, 84. In Bank of United States v. Owens, this court said: "There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal." There are some exceptions to this general rule, and the last two cases cited furnish instances thereof. These exceptions are based upon a supposed intent of the legislature. In Pangborn v.

Westlake, it was thus stated how the exception should be determined: "We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactments; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." And in Harris v. Runnels, this court, after noticing some fluctuations in the course of decision, and observing "that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so," added: "It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions; nor when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrong-doer from the ordinary consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty. There is, therefore, nothing in the language of the ordinance or the subject-matter of the regulations which excepts this case from the ordinary rule, that an act done in disobedience to the law creates no right of action which a court of justice will enforce.

For these reasons the judgment of the circuit court will be reversed and the case remanded with instructions to overrule the demurrer to the answer.

PANGBORN v. WESTLAKE.

1873. 36 Iowa 546.

IN this case a note and mortgage were given in pursuance of a contract for the sale of town lots entered into before the plats were recorded as required by statute, which imposed a penalty for failure to comply therewith.

COLE, J.— * * * There is no doubt that the well-settled general rule is that when a statute prohibits or attaches a penalty to the doing of an act, the act is void and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it; or, in other words, a penalty implies a prohibition though there are no prohibitory words in the statute, and the prohibition makes the act illegal and void. * * * But, notwithstanding this general rule, it must be apparent to every legal mind, that when a statute annexes a penalty for the doing of an act, it does not always imply such a prohibition as will render the act void. Suppose, for instance, the act itself expressly provided that the penalty annexed should not have the effect of rendering the act void. Surely in such case the courts would not give such force to the legal implication, under the general rule above quoted, as to override the express negation of it in the statute itself. Then, upon this conclusion, we are prepared for the next step, which is equally plain, that if it is manifest from the language of the statute, or from its subject-matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and its plain intent. We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly. The following cases will abundantly vindicate, as well as illustrate this statement of the law. Ferguson v. Norman, 5 Bingham's New Cases 76 (opinion of Tindal, C. J., p. 83); s. c. in 35 E. C. L. 51 (i. e. 55); Harris v. Runnels, 12 How. (U. S.) 79; Johnson v. Hudson, 11 East 180; Brown v. Duncan, 10 Barn. & Cress. 98; Hodgden v. Temple, 5 Taunt. 181; Fockler v. Ford *et al.*, 24 How. (U. S.) 322; The Oneida Bank v. The Ontario Bank, 21 N. Y. 490 (see opinion by Comstock, C. J., on p. 495). * * * Under this rule we must hold that the note and mortgage in this case are not illegal and may, therefore, be enforced. * * *

LEADING CLASSES OF AGREEMENTS OPPOSED TO THE POLICY OF THE LAW.

§ 65 (A)—Prejudicial to a Nation in Relation With Other Nations.

MONTGOMERY v. UNITED STATES.

1873. 15 Wal. (U. S.) 395.

THE petition in this case was filed in the court of claims by the appellant, to recover for a certain property seized and sold under authority of a sequestration commission, organized by order of Major-General Butler. Judgment for defendant. Appeal.

STRONG, J.—Whether the contract under which the appellant claims to have become the owner of the sugar, molasses and rum was so far executed that, without more, it would have passed the property, had it been legal, it is unnecessary to consider; for we are of opinion that, whether executed or executory, it was illegal and void. It was a clear case of trading with a public enemy. The subject of the contract was personal property within the confederate lines. It was a crop at the time on the plantation of Leo L. Johnson, in the parish of La Fourche, near La Fourche crossings. It belonged also to Johnson, who was then domiciled in the enemy's territory, and who was himself an enemy. This is expressly stated in the contract itself. The appellant's right, therefore, is founded upon an attempted purchase, during the war, from an enemy, of enemy's property, in direct violation not only of the laws which always prevail in a state of war, but also in violation of the acts of congress. It is vain to contend that any right can be acquired under such a contract.

It is true the sale was negotiated by agents of Johnson, living outside of the enemy's territory, but it was not the less his act because it was done by those acting under his authority. Nothing is clearer, says Pres. Woolsey, than that all commercial transaction of whatever kind (except ransom contracts) with the subjects or in the territory of the enemy, whether direct or indirect, as through an agent or partner who is neutral, are illegal and void. Woolsey's International Law, § 117. This is not inconsistent with the doctrine that a resident in the territory of one belligerent may have in times of war an agent residing in the territory of the other belligerent, to whom his debtor may pay the debt, or deliver property in discharge of it. Such payments or deliveries involve no intercourse between enemies. The present case exhibits a transaction not wholly within enemy's territory, but a sale from an enemy to a friend. If that can

be made through an agent, then the rule which prohibits commercial intercourse is a mere regulation of the mode of trade. It may be evaded by simply maintaining an agency in the enemy's territory. In this way every pound of cotton or of sugar might have been purchased by northern traders from those engaged in the rebellion. Perhaps the rule is stated too broadly in Woolsey's Commentaries, and in many elementary books, but it is certain that "every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either between two countries (at war), directly or indirectly, or through the invention of third persons or partnerships, or by contracts in any form looking to or involving such transmission," are prohibited. Kershaw v. Kelsey, 100 Mass. 561. The contract in this case contemplated the delivery of the sugar, molasses and rum at New Orleans, then within the federal lines. There, on its being weighed and measured, payment was to be made to Johnson's agents. If this be allowed, the enemy is benefited and his property is protected from seizure or confiscation.

It has been argued that because Burbridge & Co. the agents, had a lien upon the property for advances made by them, and had also a power to sell for the repayment of their advances, the sale which was made ought not to be regarded as a sale by Johnson. Yet the only authority they had to sell at all, resulted either from express power given to them by the owner, or from the relation to him in which they then stood. They might have sold their lien, or the debt secured by it; and had they done so, the sale would have involved no trading with the enemy. But they undertook to sell Johnson's property, describing it as such in the instrument of sale, and describing themselves as Johnson's agents. Very clearly, in effect, the parties to the transaction were the appellant and a public enemy.

For this reason the judgment is affirmed.

CLARKE v. MOREY.

1813. 10 Johns. (N. Y.) 69.

THIS was an action of assumpsit on a promissory note.

KENT, C. J.—The second plea states that the plaintiff is an alien, born out of the allegiance of the United States and under the allegiance of the king of the United Kingdom of Great Britain and Ireland, and not naturalized, and that war exists between the United States and the said kingdom; and that the plaintiff came into the United States and remains here without any letters of safe conduct from the president of the United States, or any license to remain here.

This plea is not without precedent in the English books (Rast Ent., 252 b, 605 b; Denier v. Arnaud, 4 Mod. 405; the record of which plea Lord Kenyon, in 8 Term Rep. 167, says he had examined); but there are many and weighty reasons why it cannot be supported. To render the plea of alien enemy good, it seems now to be understood to be the law of England that the plea must not only aver that the plaintiff was an alien enemy, but that he was adhering to the enemy. The disability is confined to these two cases: 1. Where the right sued for was acquired in actual hostility, as was the case of the ransom bill in Anthon v. Fisher, Doug., 649, note. 2. Where the plaintiff, being an alien enemy, was resident in the enemy's country; such was the form of the plea in George v. Powell, Fortesc., 221, and in Le Bret v. Papillon, 4 East 502, and such was the case with the persons in whose behalf, and for whose benefit the suit was brought upon the policy, in Brandon v. Nesbitt, 6 Term Rep. 23.

It was considered in the common pleas, at Westminster, as a settled point (Heath, J., in Rooke, J., in Sparenburgh v. Bannatyne, 1 Bos. & Pull 163), that an alien enemy under the king's protection, even if he were a prisoner of war, might sue and be sued. This point had long before received a very solemn decision in the case of Wells v. Williams, 1 Lord Raym. 282; 1 Lutw. 34, s. c. 1 Salk. 46. It was there decided that if the plaintiff came to England before the war, and continued to reside there, by the license and under the protection of the king, he might maintain an action upon his personal contract; and that if even he came to England after the breaking out of the war, and continued there under the same protection, he might sue upon his bond or contract; and that the distinction was between such an alien enemy, and one commorant in his own country. The plea, in that case, averred that the plaintiff was not only born in France, under the allegiance of the French king, then being an enemy, but that he came to England, without any safe conduct, and the plea was held bad on demurrer. It was considered, that if the plaintiff came to England in time of peace, and remained there quietly, it amounted to a license, and that if he came over in time of war, and continued without disturbance, a license would be intended. It is, therefore, not sufficient to state that the plaintiff came here without safe conduct. The plea must set forth, affirmatively, every fact requisite to prove that the plaintiff has no right of action. It is not to be favored by intendment. This was the amount of the decision in Casseres v. Bell, 8 Term Rep., 166; and one of the judges in that case referred to the decision in Wells v. Williams as authority, and so it has uniformly been considered in all the books; and all the former precedents and *dicta* that are repugnant to it may be considered as overruled. Though there is a loose and unsatisfactory note of Sylvester's case, in 7 Mod. 150, which was a few years later, and looks somewhat to the contrary; yet it never has been

considered as affecting the former decision. Indeed, the law on this subject has undergone a progressive improvement. The doctrine once held in the English courts, that an alien's bond became forfeited by the war (Year Book, 19 Edw. IV, pl. 6), would not now be endured. The plea is called in the books an odious plea, and the latter cases concur in the opinion that the ancient severities of war have been greatly and justly softened, by modern usages, the result of commerce and civilization.

In the case before us, we are to take it for granted (for the suit was commenced before the present war) that the plaintiff came to reside here before the war, and no letters of safe conduct were, therefore, requisite, nor any license from the president. The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the executive shall think proper to order the plaintiff out of the United States; but no such order is stated or averred. This is the evident construction of the act of congress of the 6th July, 1798, entitled "An Act Respecting Alien Enemies," (Sess. 1, Cong. 5, ch. 73). Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.

The right to sue, in such a case, rests on still broader ground than that of a mere municipal provision, for it has been frequently held that the law of nations is part of the common law. By the law of nations, an alien, who comes to reside in a foreign country, is entitled, so long as he conducts himself peaceably, to continue to reside there, under the public protection; and it requires the express will of the sovereign power to order him away. The rigor of the old rules of war no longer exists, as Bynkershoek admits, when wars are carried on with the moderation that the influence of commerce inspires. It may be said of commerce, as Ovid said of the liberal arts: *Emollit mores, nec sinit esse feros.*

We all recollect the enlightened and humane provision of Magna Charta, ch. 30, on this subject; and in France the ordinance of Charles V, as early as 1370, was dictated with the same magnanimity; for it declared that, in case of war, foreign merchants had nothing to fear, for they might depart freely with their effects, and if they happened to die in France, their goods shall descend to their heirs. (Henault's Abrege Chron., tom. 1, 338.) So all the judges of England resolved, as early as the time of Henry VIII, that if an alien came to England, before the declaration of war, neither his person, nor his effects, should be seized in consequence of it. (Bro. tit. Property, pl. 38; Jenk. Cent., 201; Case, 22.) And it has now become the sense and practice of nations, and may be regarded as the public law of Europe (the anomalous and awful case of the

present violent power on the continent excepted), that the subjects of the enemy (without confining the rule to merchants), so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued. (Bynk. Quaest. Jur. Pub., bk. 1, ch. 7, 25, § 8.) It is even held, that if they are ordered away in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit. (Emerigon, Traite des Assurances, tom. 1, 567.)

Modern treaties have usually made provision for the case of aliens found in the country, at the declaration of war, and have allowed them a reasonable time to collect their effects and remove. Bynkershoek gives instances of such treaties existing above two centuries ago, and for a century past, such a provision has become an established *formula* in the commercial treaties. Emerigon, who has examined this subject with the most liberal and enlightened views, considers these treaties as an affirmance of common right, or the public law of Europe, and the general rule is so laid down by the later publicists, in conformity with this provision. (Vattel, bk. 3, ch. 4, § 63; Le Droit Public de L'Europe, par Mably; Euvres, tom., 6, 334.) Some of these treaties have provided that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they behave peaceably (Treaty of Commerce between Great Britain and France, in 1786, and of Amity and Commerce between Great Britain and the United States, in 1794); and where there was no such treaty, the permission has been frequently announced in the very declaration of war. Sir Michael Foster (Discourse of High Treason, 185, 186) mentions several instances of such declarations; and he says that the aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. The act of congress of July, 1798, before alluded to, provides, in cases where there may be no existing treaty, a reasonable time, to be ascertained and declared by the president, to alien enemies resident at the opening of the war, "for the recovery, disposal and removal of their goods and effects." This statute may be considered, in this respect, as a true exposition and declaration of the modern law of nations.

The opinion that wars ought not to interfere with the security and collection of debts, has been constantly gaining ground, and the progress of this opinion is worthy of notice, as it will teach us with what equity and liberality, and with what enlarged views of national policy, the question has been treated. A right to confiscate the debts due to the enemy was the rigorous doctrine of the ancient law; but a temporary disability to sue, was all Grotius, bk. 3, ch. 20, § 16, seemed willing to allow to hostilities. Since his time, continued and successful efforts have been made to strengthen justice, to restrain the intemperance of war, and to promote the intercourse and happi-

ness of mankind. The power to collect debts, notwithstanding the event of war, is not an unusual provision in the conventional law of nations. In the treaty of commerce between England and France, in 1713, it was provided by the second article, that in case of war, the subjects of each power, residing in the dominions of the other, should be allowed six months to retire with their property, and in the meantime, should be at full liberty to dispose of the same, "and the subjects on each side were to have and enjoy good and speedy justice, so that during the said space of six months they may be able to recover their goods and effects." So also in the treaty of commerce between Great Britain and Russia, in 1766, and again in 1797, it was provided, that in case of war, the subjects of each were to be allowed one year to withdraw with their property; and they were also authorized to substitute others to collect their debts for their benefit, "which debts the debtors should be obliged to pay in the same manner as if no such rupture had happened." A similar provision, in substance, was inserted in the treaty between the United States and Russia, in 1785; and in the treaty of commerce between the United States and Great Britain, in 1795, the government of each country was prohibited to interfere, either by confiscation or sequestration, with private contracts, and it was expressly declared to be unjust and impolitic, that the debts of individuals should be impaired by national differences.

The case before us does not raise the question, nor do we give any opinion in favor of the right of action by aliens who resided in the enemy's country when war was declared, and when the action was commenced. The cases appear to be against such right. But as to aliens who were residents with us when the war broke out, or who have since come to reside here by a presumed permission, the authorities seem to be decisive. And whether we consider this case in reference to the decisions of the English courts, to the act of congress or the sense of European nations, declared in their treaties and by their writers on public law, the plea must be overruled; and the plaintiff is entitled to judgment, upon his demurrer.

Judgment for the plaintiff.

THE WASHINGTON UNIVERSITY OF MISSOURI v. FINCH.

1874. 18 Wall. (U. S.) 106.

MILLER, J.— * * * This court has never decided nor intentionally given expression to the idea that the property of citizens of the rebel states, located in the loyal states, was, by the mere existence of the war, exempted from judicial process for debts due to

citizens of the loyal states contracted before the war. A proposition like this, which gives an immunity to rebels against the government not accorded to the soldier who is fighting for that government, in the very locality where the other resides, must receive the gravest consideration and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war.

The case of McVeigh v. U. S., 11 Wall. (U. S.) 259, holds that an alien enemy may be sued though he may not have a right to bring suits in our courts. And that when he is sued he has a right to appear and defend. "Whatever," says the court, "may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense."

And this proposition is supported by the authorities there cited as well as by sound reason. If such be the rule in regard to alien enemies in a war between independent states, it should be quite as applicable, if not more so, between citizens of the same government who are only enemies in a qualified sense in a civil war. * * *

HANGER v. ABBOTT ET AL.

1868. 6 Wall. (U. S.) 532.

DECLARATION in assumpsit. Defendants pleaded that the cause of action did not accrue within three years next before the commencement of this suit. Plaintiffs replied that the cause of action accrued before the 25th day of October, 1859, and that on the 6th day of May, 1861, all the lawful courts of the state where the defendant resided were closed by reason of the insurrection and rebellion which then and there arose against the lawful authority of the United States and that the courts have remained closed from that day to the first day of January, 1865. Demurrer to replications. Judgment for plaintiffs. Writ of error.

CLIFFORD, J.— * * * War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country. Wheat. Mar. Capt. 209; The William Bagaley (5 Wall. (U. S.) 377); Jecker v. Montgomery, 18 How. (U. S.) 111. Upon this principle of public

law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation. The Rapid, 8 Cranch. (U. S.) 155; The Hoop, 1 C. Rob. 196.

Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties and obligation, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties. Griswold v. Waddington, 15 Johns. (N. Y.) 57; s. c. 16 Johns. (N. Y.) 438; Macl. Ship. 475; Story Part., § 316. Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defense. Windham v. Paterson, 7 Taunt. 144. Various attempts, says Mr. Wheaton (Int. Law, Lawrence, 551, 556), have been made to evade the operation of the rule, and to escape its penalties, but they have all been defeated by its inflexible rigor. All foreign writers on international law concur in the opinion that the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealings between the subjects of the belligerent states. Hostilities once commenced, any attempt at trading on the part of the subjects of either state, unless by permission of the sovereign, is prohibited, and becomes *ipso facto* a breach of the allegiance due to their respective sovereigns, and as such is forbidden by the public law of the civilized world. Potts v. Bell, 8 T. R. 561; Bynk., B. 1, c. 3, Vatt., B. 3, c. 4.

Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of congress. Esposito v. Bowden, 4 El. & Bl. 963; s. c. 7 El. & Bl. 778.

In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked impolitic right condemned by the enlightened conscience and judgment of modern times. Kent Com. 73. Better opinion is, that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended; which is a necessary conclusion on account of the in-

ability of an alien enemy to sue or to sustain, in the language of the civilians a *persona standi in judicio.* Flindt v. Waters, 15 East 260; 2 Kent. Com. (11th ed.) 76.

Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party.

We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chit. C. & M. 423. During war, says Sir William Scott, there is a total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. The Hoop, 1 C. Rob. 200; Alcinous v. Nigreu, 4 El. & Bl. 217. Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. He says, in effect, that the power of confiscating such debts theoretically exists, though it is seldom or never practically exerted; that the right of the creditor to sue for the recovery of the debt is not extinguished; that it is only suspended during the war, and revives in full force on the restoration of peace. Wheat. Int. Law, by Lawrence, 541-877; Furtado v. Rogers, 3 B. & P. 191; Ex Parte Roussmaker, 13 Ves. Jr. 71; Signora, Edws. Adm., 60; Brown v. U. S., 8 Cranch (U. S.) 110; Ware v. Hylton, 3 Dall. (U. S.) 199; Upton, Mar. W. & P. 42; Halleck Int. Law 358.

Under the 34th section of the judiciary act, the statutes of limitations of the several states, where no special provision has been made by congress, form the rule of decision in the courts of the United States, and the same effect is given to them as is given in the courts of the state. McCluny v. Silliman, 3 Pet. (U. S.) 270; Bank of U. S. v. Daniel, 12 Pet. (U. S.) 32; Porterfield v. Clark, 2 How. (U. S.) 125; Ang. Lim., § 24.

Grant that the law of nations is that debts due from individuals to the enemy may, by the rigorous application of the rights of war, be confiscated, still it is a right which is seldom or never exercised in modern warfare, and the rule is universally acknowledged, that if the debts are not so confiscated, the right to enforce payment revives when the war has terminated. Manning Int. Law 130; Bynk., B. 1, ch. 3. Vattel says the sovereign may confiscate debts due from his subjects to the enemy, if the term of payment happens in time of war,

or at least he may prohibit his subjects from paying while the war continues, but at present a regard to the advantages and safety of commerce induces a less rigorous rule. Vatt., B. 3, ch. 5, § 77.

Where a debt has not been confiscated, the rule is undoubted that the right to sue revives on the restoration of peace, and Mr. Chitty says that with the return of peace we return to the creditor the right and the remedy. Unless we return the remedy with the right, the pretense of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended. * * *

KENNETT ET AL. v. CHAMBERS.

1852. 14 How. (U. S.) 38.

THIS was a bill for specific performance of a contract, made in Ohio in 1836 whereby appellants, citizens of the United States, agreed to furnish and did furnish, money to appellee, a general in the Texan army, to enable him to raise and equip troops to be employed against Mexico.

TANEY, C. J.— * * * The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution; but whether such a contract, made at that time, within the United States, for the purposes stated in the contract, and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United

States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power. * * *

CORBIN ET AL. V. HOULEHAN.

1905. 100 Me. 246, 61 Atl. 131.

WISWELL, C. J.—In this action, brought by citizens of the state of Ohio against a citizen of this state in the superior court for Kennebec county, the plaintiffs seek to recover the unpaid balance of a bill of over $600 for a large quantity of intoxicating liquor in barrels and cases, sold by them to the defendant. The order for this liquor was taken by the plaintiffs' representative at the defendant's place of business, sent to the plaintiffs in Ohio, where, after making certain inquiries in regard to the financial responsibility of the defendant, the order was accepted by the plaintiffs, and the liquor shipped as directed. The contract for the sale and purchase of these liquors was not finally completed until the order was accepted by the plaintiffs in the state of Ohio, so that it may be assumed that the contract of sale was made in the latter state, where such sale was legal. These liquors were bought by the plaintiffs for the purpose and with the intention of selling them in this state, in violation of the laws of the state, and they were subsequently so sold by him, and the plaintiffs, when they accepted the order and thereby completed the contract, not only knew that they were intended for illegal sale, as practically admitted by one of the plaintiffs in his testimony, but also materially aided the defendant in his attempt, apparently successful, to prevent their seizure, by marking the goods, in accordance with a direction of the purchaser contained in the order, in the name of a person other than the purchaser, which name was adopted by

him for this purpose, and it was known by the plaintiffs' agent that the name in which the liquors were to be shipped was fictitious, and adopted by the defendant for the purpose of avoiding their seizure. * * *

It is a fundamental and elementary rule of the common law that the courts will not enforce illegal contracts, or contracts which are contrary to public policy, or which are in contravention of the positive legislation of the state. The general rule undoubtedly is that the validity of the contract—that is, the question whether it is a legal or illegal one—is judged by the law of the state or country in which it was made, and that a contract good where made is good everywhere. But this rule is subject to some exceptions, one of the most important of which is that, where the contract violates the positive legislation or the established public policy of the state of the forum, it will not be enforced in that state, although perfectly valid and legal according to the laws of the state or country where it is made. This principle is thus stated in Cooley's Constitutional Limitations, p. 178: "In the making of contracts, the local law enters into and forms a part of the obligation; and, if the contract is valid in the state where it is made, any other state will give remedies for its enforcement, unless, according to the standard of such latter state, it is bad for immorality, or is opposed in its provisions to some accepted principles of public policy, or unless its enforcement would be prejudicial to the state or its people." The same principle was thus clearly stated in Banchor v. Mansel, 47 Me. 58: "It is a general principle of law that the validity of a contract is to be determined by the law of the place where it is entered into. But to this rule there are exceptions. No nation is bound to enforce contracts injurious to its interests or in fraud of its laws, though made without its jurisdiction and valid when and where made. * * * No state can be justified in requiring its tribunals to enforce obligations which it holds to be founded in wrong, or which are made elsewhere for the express purpose of evading a prohibition decreed by the law of the country where they are to be performed." Authorities in support of this principle may be found in the decisions of almost every state in the union. They are too numerous to be cited here, but some of them will be later herein considered.

Independently of any statute, according to this well-settled principle, the courts of a state would not enforce a contract in behalf of a vendor to recover the purchase price of goods sold by him to a vendee, if the vendor not only had knowledge of the illegal purpose of the purchaser to sell them in violation of the laws of the state to which they were to be transported, but, as well, did some act in furtherance of this illegal purpose. A person should not and would not be allowed to resort to the courts of a state to enforce a contract which he had made for the purpose of violating or evading the laws of that state, or of aiding another to violate, even if the contract was

recognized as valid by the laws of the state where it was actually entered into. There has been much discussion in the decided cases as to whether mere knowledge upon the part of a vendor of the illegal intention of the vendee with respect to the use of the goods purchased is sufficient to prevent him from obtaining a remedy in the courts of the state whose laws the vendee intended to violate by an illegal use of the goods purchased, or whether it was necessary, in order to prevent him from being entitled to a remedy in such courts, that he should have participated in the illegal purpose by aiding and facilitating the purchaser in some way. For a very full discussion of this question, see Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, wherein the court, after a very full review of many authorities upon the question, decided that it was not sufficient that a vendor living in another state, who there sold and delivered intoxicating liquors to a vendee, who resold them in the state of New Hampshire in violation of the laws of that state, had reasonable cause to believe, and did believe, that they were purchased by the vendee with the intention of there reselling them contrary to law, to prevent a recovery of the purchase price in the latter state. See also, Webster v. Munger, 8 Gray (Mass.) 587. But all courts, so far as we are aware, agree that when the vendor not only had knowledge of the illegal use to which the vendee intended to put the goods purchased, but also, in making such sale, did some act in furtherance of this illegal purpose, then he cannot resort to the courts of the state which were intended to be violated to enforce the collection of the purchase price for the goods sold for this illegal purpose.

And the principle goes even further than this. Not only will the courts of the state whose laws were to be violated refuse to enforce a contract made under these circumstances, but the courts of the state where the contract was made, and under the laws of which it was a valid and legal one, will not give a remedy to enforce such a contract, if it was made with a view to a violation of the laws of another state, and the parties seeking a remedy participated in the illegal purpose of the other party to the contract, and did some act in its furtherance. In Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. 446, it was decided that the sale and delivery of liquors in Massachusetts, where such sale was legal with a view to their being resold by the purchaser in Maine, in violation of the laws in the latter state, will not sustain an action to recover the purchase price thereof even in the state where the contract of sale was made. In the opinion in that case it is said: "The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme. * * *

§ 65 (B)—Injuring the Public Service.

NICHOLS v. MUDGETT.

1860. 32 Vt. 546.

ALDIS, J.—The auditor's report states the following facts:

The defendant owed the plaintiff about $150. The plaintiff, in September, 1854, was a candidate for town representative of Westford. The defendant had usually voted for the party opposed to the plaintiff. They made this agreement: the defendant should use his influence for the plaintiff's election, and do what he could for that purpose, and if the plaintiff was elected, that should be a satisfaction of the debt which the defendant owed the plaintiff. Nothing was said about the defendant's voting for the plaintiff except what may be inferred from what is above stated; but he did vote for him, and would not have done so and would not have favored his election, but for the agreement.

1. It is urged by the defendant that the court cannot presume from the above statement that the agreement was that he should vote for the plaintiff, because it is not expressly found. In construing the reports of auditors we are to give them a reasonable interpretation, and are to presume or find all facts which reasonably, directly and naturally flow from the facts stated. The defendant agreed "to do what he could for the plaintiff's election." He was a voter and could vote for him, and clearly that was what the agreement bound him to do. Any other construction of the report would be absurd. It was, therefore, an agreement for the sale of his vote.

It is not claimed but that such an agreement is immoral and void. It is only claimed that they did not in express words say that the defendant should vote for the plaintiff. Although nothing was said about the defendant's vote, yet the meaning was unmistakable. Men who enter into corrupt bargains are not to be expected to speak out in plain language the name of the criminal act which they are about to commit. The consciousness of guilt and the deformity of naked crime lead men to cover up foul deeds with fair words and vague expressions. They do not seem so bad to themselves as they would if they spoke of their criminal acts in the outright plain language of honesty and of the law.

2. The bargain was not only the sale of the defendant's vote, but also of his influence and exertions against his convictions and opinions. The defendant generally voted for the candidate of the other party, and but for this agreement, would not have voted for the plaintiff nor favored his election. This also was immoral and against public policy. Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty. If for money or other personal profit, he agrees

to exert his influence against what he believes to be for the public good, he is corrupt, and the agreement void, even though in the actual exercise of his influence against his conscience he resorts to no unlawful means. Such bargains cannot be enforced in law. And the reason why they cannot be enforced is, not merely because they are made criminal acts by statute, or are opposed to the provisions of the constitution, but because of their own inherent turpitude, because they are corrupt and corrupting, because they are destructive to public virtue and the welfare of the community. In republican governments especially, whatever tends to destroy the purity of elections should be guarded against with the strictest watchfulness, and pursued with the most prompt condemnation by court and legislators.

The agreement in this case seems to combine many of the worst elements of political corruption. It was for pecuniary profit. It was for the sale of his own vote. It was for the sale of his influence against his convictions of duty. His pay was made to depend on the result of the election, thus stimulating him to activity and fraud by a pecuniary interest in the result. * * *

SCHNEIDER ET AL. V. LOCAL UNION NO. 60.

1905. 116 La. 270, 40 So. 700.

MONROE, J.— * * * "The courts will not enforce an agreement the object of which is forbidden by law or is opposed to the policy of the law. * * * The following are the leading classes of agreements contrary to the policy of the law: (1) Agreements which tend to injure the public service. Of this character is an agreement to use one's influence to secure the election or appointment of a person to a public office. Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Nichols v. Mudgett, 32 Vt. 546; Gray v. Hook, 4 N. Y. 449; Filson's Trustee v. Himes, 5 Pa. St. 452, 47 Am. Dec. 422." Principles of Contract (Benjamin), pp. 245, 257.

This elementary doctrine is more fully stated in the brief of the counsel for the plaintiffs in the form of excerpts from what we take to be a recent work on Public Policy (Greenhood) as follows:

"Any contract which contemplates conduct which will amount to an imposition upon a public officer in the exercise of his discretion is void. * * * Any contract by one acting in a representative capacity, which restricts the free exercise of a discretion vested in him for the public good, is void. * * * Any contract to appoint to a public office, or involving the sale of a public office, or quasi-public office, or to do anything in consideration of the promisee exchanging offices, or securing an office for the promisor, or recommending him for such

office, or resigning any office, is void. * * * It is the duty of the officer, having a power of appointment, to make the best appointment in his power, at the time when he makes the appointment. The public have a right to demand this, and it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made. If he has promised the office to one person, and has since discovered that the public will be better served by another, he must be at liberty to make the better appointment, and that, too, although no such absolute disqualification may exist in regard to the person to whom it was first promised as would constitute a defense to an action in damages if such action could be maintained on the promise. Whatever may be the practice, appointments are, in theory, made for the public good. That is the reason why the appointee may not purchase the office. In a similar way, though not to the same extent, the public good would be injured if a promise to make an appointment were held to be legally binding, so as to control the exercise of that judgment which the appointing officer ought to exercise when he makes the appointment. The right of appointment is not the property of the appointing officer, and he has no right to barter it or dispose of it. It is merely a political power entrusted to him to be exercised, not to be sold. * * * Any contract by which * * * the liberty of an elector to vote according to his conscience is restricted, or which contemplates the use of improper influence upon such elector, or is calculated to exercise an injurious influence over the purity of elections in the state, or in another state, is void."

Referring to Greenhood on Public Policy, pp. 336-339, 387. * * *

GRAY v. HOOK.

1851. 4 N. Y. 449.

IN this case there was an agreement between the parties who were applicants for an official position, that one of them should withdraw and aid the other, in procuring the appointment, in consideration of one-half of the fees and emoluments of the office.

MULLETT, J.— * * * Comyn, says, "All contracts or agreements which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void; and whenever a contract or agreement is entered into with a view to contravene any of these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction, for *ex turpi contractu actio non oritur,* is the rule both in law and equity." (1 Com. on Cont. 30;

1 Fonbl. Eq., b. 1, ch. 4, § 4; 1 Story's Eq. 296; 4 Hill (N. Y.) 424; 4 Cond. Rep. 304; 11 Wheat. (U. S.) 258.) This general principle is universally recognized by the American courts, and has frequently been applied, in this state, to contracts which had for their object the perversion of the more ordinary operations of the government, such as contracts to prevent fair competition at legal auction sales (3 Johns. Cas. (N. Y.) 29; 6 Johns. (N. Y.) 194; 8 *id.* 444); and contracts to prevent the due administration of the insolvent laws. (3 Caines (N. Y.) 213; 2 Johns. (N. Y.) 386; 4 *id.* 410; 9 *id.* 295; 19 *id.* 311).

There is quite as much reason for applying this principle to contracts made for the purpose of influencing and perverting the more important and extensive operations of the legislative and executive powers of the government. Every citizen owes to his government and all its officers while executing their official duties, truth and fidelity. All the actions of the government and its officers are based upon certain facts, assumed, or proved, and falsehood and deception in reference to these facts are moral wrongs injurious to the whole state, whose government it is, and, therefore, against public policy. The strength, durability and prosperity of our political institutions depends entirely on the intelligence, integrity and faithful support of the people. No citizen can, therefore, legally stipulate to embarrass the operations of government, by diminishing its means to execute its powers. It has been decided by the supreme court of New Jersey, that where A and B contemplated applying to the postmaster-general for a contract to carry the mail, and A agreed to give B $1,000, on condition that he would forbear to propose or offer himself to the postmaster-general to carry the mail on a certain route, such agreement was against public policy, and no action could be maintained upon it. (5 Halst. (N. J.) 78.) The supreme court of Pennsylvania has decided that a contract founded upon a promise and engagement to procure signatures to a petition and obtain a pardon from the governor, for one convicted of a crime and sentenced to punishment, was unlawful and could not be enforced by an action. (7 Watts. (Pa.) 152.) Also, that a contract to procure, or endeavor to procure, the passage of an act of the legislature, by any sinister means, or by using personal influence with the members, was void, as being inconsistent with public policy, and the integrity of their political institutions. (5 Watts. & Serg. (Pa.) 315.) So an agreement to pay a man for exerting an influence over a railroad company, to induce them to locate their depot, at a particular place, was decided to be unlawful and void by the supreme judicial court of Massachusetts. (18 Pick. (Mass.) 472.) An agreement by an administrator to sell the land of an intestate, when a surrogate's order for that purpose should be obtained, to a particular person, was declared to be void by the supreme court of New York. (3 Cow. (N. Y.) 299.)

By the agreement under consideration, Hook was to withdraw his application, which he had already made, and aid Gray in pursuing his, not for a fixed and certain pecuniary consideration merely, but he was to have one equal half of the fees and emoluments of the office, as long as Gray should hold it. Thus stipulating for a dangerous influence over a profitable office which was not intrusted to him, and for the performance of the duties, of which he was under no pecuniary or official obligation. This is the nature of the original agreement, as offered to be proved, excluding all stipulation respecting the deputyship. I think that this contract was void, because it stipulated that Hook should have a pecuniary compensation for withdrawing his application by which he had probably driven off competition, and contributed to reduce the number of applicants to himself and Gray. I have no doubt that it is void, because it stipulated that Hook should have a pecuniary compensation for aiding Gray to obtain the appointment. And I have no doubt that any agreements between two citizens, by which one stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that that other will aid him in obtaining it, is void. * * *

FERRIS v. ADAMS.

1848. 23 Vt. 136.

REDFIELD, J.—This is an action upon a promissory note for $30, executed by the defendant to the plaintiff, while sheriff of the county of Chittenden, upon the occasion of appointing the defendant his deputy, for the ensuing year.

The leading inquiry in the case is, whether such a consideration is one upon which the law will uphold an assumpsit. It could scarcely be doubted at this day, we think, that the appointment of sheriff's deputy is a public office, and one which very considerably concerns the administration of justice. And it seems to be conceded in all the cases that the sale of offices of that character, or of one's influence in obtaining appointments to them, is a transaction of so vicious a character, that it is no sufficient consideration for a promise. This is distinctly admitted, in terms, in Richardson v. Mellish, 2 Bing. 229, 9 E. C. L. 557, which is the case most relied upon in argument for the defendant, and which, undoubtedly, is the strongest case in the English books, against holding contracts void, upon any supposed grounds of public policy. The court in this case, which concerned the appointment of certain persons to the command of merchant ships in the East India Company's service, hold, that such an appointment is not a public office. But Best, Ch. J., says: "I have never doubted, that it is an offense at common law, to sell offices."

"If a man sell an office, he cannot maintain an action growing out of such a contract." This is the general current of all the English cases, and of all the English books upon this subject. 7 Bac. Ab., tit. Offices and Officers, F. 13. * * *

BOWERY NAT. BANK v. WILSON ET AL.

1890. 122 N. Y. 478, 25 N. E. 855.

FOLLETT, C. J.— * * * It is settled in this state that an assignment by a public officer of his unearned salary is contrary to public policy and void. Bliss v. Lawrence, 58 N. Y. 442; Billings v. O'Brien, 4 Daly (N. Y.) 556, 45 How. Pr. (N. Y.) 392, and 14 Ab. Pr. (N. S.) (N. Y.) 238. The same rule is established in England, and in some of the United States. Hill v. Paul, 8 Clark & F. 295; Cooper v. Reilly, 2 Sim. 560; Wells v. Foster, 8 Mees. & W. 149; Beal v. McVicker, 8 Mo. App. 202; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Pom. Eq. Jur., § 1276; Story Eq. Jur. (13th ed.), § 1040d; Greenh. Pub. Pol., rule 297.

In Bliss v. Lawrence, *supra*, it was said: "Salaries are, by law, payable after work is performed, and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. * * * If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles be entitled to receive pay directly, and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service." The reasons here given for holding the unearned salaries of public officers to be unassignable apply with greater force to fees payable upon the due performance of public duties which cannot be discharged by any other officer. If a sheriff can legally assign the fees which may become due him for services to be performed for the public in any given month, he may make a valid assignment of all of the fees that shall become due him for services during the whole of his term. If he could assign to one he could assign to many, and every purchaser would be entitled to the rights of assignees of claim against individuals; and in the case of conflicting interests or of disputes between the officer and his alleged transferee, the government would have to decide, at its peril, between them, or be subjected, as in the case at bar, to litigation. By a division of the

unaudited claims of a public officer among many persons a powerful influence in their support may be brought to bear upon the auditing officers, which would not exist if the demands were held by the officer who rendered the service. The statutes provide for the payment of public servants after the rendition of their services, and make no distinction in this respect between officers compensated by a salary or by fees. An officer, having assigned his interest in a compensation to become due him for future public services, would have less interest in the punctual and efficient performance of his duties, and, in the case of improvident assignments, might be without the ability to discharge them. * * *

TRIST v. CHILD.

1875. 21 Wall. (U. S.) 441.

MR. JUSTICE SWAYNE delivered the opinion of the court:

This is an appeal in equity from the supreme court of the District of Columbia.

Nicholas P. Trist had a claim against the United States for his services touching the Treaty of Guadaloupe Hidalgo. After a delay of nearly twenty years, he concluded to submit it to congress and ask its payment. He made an agreement with Linus Child, that Child should take charge of the claim and prosecute it as his agent and attorney. As a compensation for the services of Child, it was agreed that he should receive twenty-five per cent of whatever sum congress might allow in payment of the claim. If nothing was allowed, he was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to congress. Before final action was taken upon it by that body, Child died. The appellee, his son and personal representative, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1870, congress appropriated the sum of $14,559.90, to pay it. The appellee thereupon applied to Trist for payment of the twenty-five per cent stipulated for in the agreement between Trist and his father. Trist refused to pay, upon the alleged ground that both father and son had grossly neglected the proper prosecution of the same, and that he had been compelled to avail himself largely of the aid of others, and that hence he ought not to pay the appellee so large a compensation. Upon the application of the appellee, the payment of the money to Trist was suspended by the government, and it is still in the treasury. The appellee thereupon filed his bill. The court

decreed to him the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by congress, until he should have paid the demand of the appellee. * * *

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked, by the younger Child, of Trist, which indicated what he considered needful; and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th of February, 1871. After giving the names of several members of congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "A promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Just. Inst., lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said: "Many contracts which are not against morality, are still void as being against the maxims of sound policy." Jones v. Randall, 1 Cowp. 39.

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:

An agreement— to pay for supporting for election a candidate for sheriff (Swayze v. Hull, 3 Halst. (N. J.) 54); to pay for resigning a public position to make room for another (Eddy v. Capron, 4 R. I. 395; Parsons v. Thompson, 1 H. Bl. 322); to pay for not bidding at a sheriff's sale of real property (Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29); to pay for not bidding for articles to be sold by the government at auction (Doolin v. Ward, 6 Johns. (N. Y.) 194); to pay for not bidding for a contract to carry the mail on a specified route (Gulic v. Ward, 5 Halst. N. J. 87); to pay a person for his aid and influence in procuring an office, and for not being a condidate himself (Gray v. Hook, 4 N. Y. 449); to pay for procuring a contract from the government (Tool Co. v. Norris, 2 Wall. (U. S.) 45); to pay for procuring signatures to a petition to the government for a pardon (Hatzfield v. Gulden, 7 Watts (Pa.) 152); to sell land to a particular person when the sur-

rogate's order to sell should have been obtained (Bridgewater v. Brookfield, 3 Cow. (N. Y.) 299); to pay for suppressing evidence and compounding a felony (Collin v. Blantern, 2 Wils. 347); to convey and assign a part of what should come from an ancestor by descent, devise or distribution (Boynton v. Hubbard, 7 Mass. 112); to pay for promoting a marriage (Schribblehill v. Brett, 4 Bro. P. C. 144; Arundel v. Trevillian, 1 Ch. 87); to influence the disposition of property by will in a particular way. Debenham v. Ox, 1 Ves. 276; see also, Add. Cont. 91; 1 Story Eq., ch. 7; Collins v. Blantern, 1 Sm. L. Cas. 676, Am. n.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315; Harris v. Roof, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Marshall v. R. R. Co., 16 How. (U. S.) 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included; drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. 1 Mont. Sp. L. 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits,

by means which, if not corrupt, were illegitimate and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principles of both are the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter, and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not

been adjudged to be illegal and void. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis.* Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

The decree of the supreme court of the District of Columbia is reversed, and the case will be remanded, with directions to dismiss the bill.

PROVIDENCE TOOL CO. v. NORRIS.

1865. 2 Wall. (U. S.) 45.

MR. JUSTICE FIELD delivered the opinion of the court:

In July, 1851, the Providence Tool Company, a corporation created under the laws of Rhode Island, entered into a contract with the government, through the secretary of war, to deliver to officers of the United States within certain stated periods, 25,000 muskets of a specified pattern, at the rate of $20 a musket. This contract was procured through the exertions of Norris, the plaintiff in the court below, and the defendant in error in this court, upon a previous agreement with the corporation through its managing agent, that in case he obtained a contract of this kind, he should receive compensation for his services proportionate to the extent of the contract. Soon afterwards a dispute arose between the parties as to the amount of compensation to be paid. Norris insisted that by the agreement with him, he was to receive the difference between the contract price and $17 a musket; while the corporation, on the other hand, contended that it had only promised a liberal compensation in case of success. Some negotiation on the subject was had between them; but as it failed to produce a settlement, Norris instituted the present action, to recover the full amount claimed by him.

Several grounds were taken, in the court below, in defense of the action; and, among others, the corporation relied upon the propo-

sition of law, that an agreement of the character stated—that is, an agreement for compensation to procure a contract from the government to furnish its supplies—is against public policy, and void. This proposition is the question for the consideration of this court. It arises upon the refusal of the court below to give one of the instructions asked. * * *

The question, then, is this: can an agreement for compensation to procure a contract from the government to furnish its supplies, be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.

We have not met with any adjudication upon an agreement precisely similar, but the principle which determines its invalidity has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation for procuring legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of elements to control the action of both, is the direct and inevitable result of all such arrangements. Marshall v. Balt. & O. R. R. Co., 16 How. (U. S.) 314; Harris v. Roof, 10 Barb. (N. Y.) 489; Fuller v. Dame, 18 Pick. (Mass.) 472.

The same principle has also been applied, in numerous instances, to agreements for compensation for procuring appointments to public offices. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position, of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation for procuring these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy. Gray v. Hook, 4 N. Y. 449.

Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

DOANE v. CHICAGO CITY RY. CO.

1896. 160 Ill. 22, 45 N. E. 507.

THIS was an action of debt brought upon a bond calling for the payment of a certain sum by the Chicago City Railway Company to the appellant, an owner of property abutting on Wabash avenue, in case a second track should be laid without his consent. The bond was given to obtain his consent as one of the owners of more than one-half the property fronting on the avenue, for the laying of the first track.

MAGRUDER, J.— * * * The city holds the fee of the streets in trust for the use of the public including the owners of property abutting thereon, and, consequently, the power to grant the use of the streets must be exercised for the benefit and in the interest of the public, including such owners. (Hunt v. Horse and Dummy Railway Co., 121 Ill. 638). The city council would not be faithful

to its trust, if it granted the use of a public street to a street railway company without being satisfied that such use of the street would be a public benefit by facilitating public travel and promoting the public convenience. The law makes the petition of the abutting property owners evidence to some extent, that the public will be benefited by the proposed laying of the tracks. Such evidence, lying at the foundation of legislative action, must be fairly and honestly given, and not purchased by considerations moving to the signers of the petition.

An agreement on the part of a corporation to grant to individuals certain privileges, in consideration that they will withdraw their opposition to the passage of a legislative act touching the interests of the corporation, is against sound public policy, prejudicial to correct and just legislation, and void. (Pingry v. Washburn, 1 Aiken (Vt.) 264; Greenhood on Public Policy, rules 316, 320.) "Legislators should act from high considerations of public duty. Public policy and sound morality * * * require, that courts should put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." (Marshall v. Baltimore and Ohio Railroad Co., 16 How. (U. S.) 314.)

Contracts for the purchase of the influence of private persons upon the action of public officials, either executive or legislative, are against public policy and void. It is sufficient that their tendency is bad. (Liness v. Hesing, 44 Ill. 113; Trist v. Child, 21 Wall. (U. S.) 441; 3 Am. & Eng. Ency. of Law, pp. 877, 878, and notes; Brown v. Brown, 34 Barb. (N. Y.) 533.) Personal influence to be exercised over a legislative body is not vendible in our system of laws and morals. (Oscanyan v. Arms Co., 103 U. S. 261.) If the appellee had made an agreement with appellant to pay him for using his influence with the common council of Chicago to induce that body to pass an ordinance permitting appellee to lay down its tracks in Wabash avenue, such contract would be conceded at once to be illegal, and no court would enforce it. We see no difference between it and the agreement made in the present case. The signing of the petition by the abutting property owner has a direct influence upon the action of the common council. An agreement to sign such a petition is an agreement to influence the common council, and, when made for a consideration moving to the property owner, is unlawful.

Where, by the statutes of a state and the ordinances of a city therein the owners of a majority of feet fronting on a street, or the part of it proposed to be graded and paved, were required to unite in an application to the city commissioner to have the work done before any action could be taken by the city authorities, it was held as follows: "Any arrangement or combination among the parties applying whereby a few individuals, desirous of causing the grading

and paving to be done, procure the signatures of others to the application by paying them a consideration therefor, either directly or indirectly, is a fraud on the law, and contrary to public policy." (Howard v. First Independent Church of Baltimore, 18 Md. 451.)

In Maguire v. Smock, 42 Ind. 1, the action was upon an agreement to pay a consideration to procure the signatures of property owners to a petition for the improvement of a street under a law, which authorized the common council of the city to cause the improvement to be made on the petition of the resident owners of two-thirds of the whole line of lots bordering on the street, or part of street, sought to be improved, etc., and it was held, that the contract was one which the courts would not aid either party to enforce; the doctrine of the Howard case, as stated above, was quoted and approved; and it was said: "Their names were to be added to the petition to affect the action of the council. The council would be controlled to a considerable extent by the wishes of the property owners. * * * They (the council) would have a right to believe, that every property owner petitioning for it * * * signed the petition in good faith, and not under a contract by which he was to be relieved of the whole, or any part, of his share of the cost of the improvement, whilst he was seeking to have others taxed for the whole amount of their share under the law." * * *

If, under the agreement, the company could not lay a second track without appellant's consent, then the petition therefor of the requisite proportion of owners, and an ordinance of the common council authorizing it, would be of no avail to secure the laying of such second track. In such case, appellant's veto would be more powerful than the public demand, as made known by the petition and ordinance provided for in the law. An agreement by a corporation, which thus hampers its power to perform a public duty imposed upon it by its charter, is against public policy and void. A contract, whereby a corporation abandons a public duty, will not be enforced. Where a railroad company, or a street railway company, has, under its charter, a franchise, which was intended, in large measure, to be exercised for the public good, any contract with an individual or private corporation, which disables it from the exercise of such franchise, or limits it in the exercise thereof to the injury of the public, is void as against public policy. (Chicago Gas Light and Coke Co. v. People's Gas Light Co., 121 Ill. 530, and cases there referred to; Marsh v. Railroad Co., 64 Ill. 14; Railroad Co. v. Mathers, 71 Ill. 592, and 104 *id.* 257; State v. Railroad Co., 29 Conn. 538; Railroad Co. v. Railroad Co., 3 Robertson 411; Railroad Co. v. Taylor, 6 Colo. 1.) * * *

WOODSTOCK IRON CO. v. EXTENSION CO.

1889. 129 U. S. 643.

MR. JUSTICE FIELD delivered the opinion of the court:

As appears from the pleadings, some time previous to November, 1881, the plaintiff below, the Richmond and Danville Extension Company, a corporation created under the laws of New Jersey, entered into a contract with the Georgia Pacific Railway Company, a corporation created under the laws of Georgia, to locate and construct for the latter company, by the nearest, cheapest, and most suitable route, a railroad from Atlanta in Georgia through Alabama to Columbus in Mississippi, at the rate of $20,000 a mile, to be paid in whole or part in the bonds of the railroad company, and in November, 1881, it was engaged in locating and constructing the road under the contract. At that time the defendant below, the Woodstock Iron Company, a corporation created under the laws of Alabama for the manufacture and sale of products of iron ore, was doing business at the town of Anniston in that state; and it then made a formal proposition in writing to the Extension Company that if it would locate and construct, or cause to be located and constructed, the railroad by way of the town of Anniston, then the Iron Company would donate and convey, or cause to be donated and conveyed, to the Extension Company sundry parcels of land both within and without the corporate limits of the town, for the location of the road, and which might be necessary for sidings or spare tracks; and would also donate and pay to the Extension Company $30,000, one-half when the road made a connection with the line of the Alabama Great Southern Railroad Company at Birmingham, Alabama, and the other half when the road made a connection with the line of the Louisville and Nashville Railroad Company at that place; the payments to be made provided the road should be so far completed as to make the connections designated within three years. The proposition was formally accepted in writing by the Extension Company, through its vice-president, John W. Johnston.

Pursuant to this contract the Extension Company located and constructed the railroad by way of the town of Anniston by the first of January, 1883, and made the connections specified, within the period designated, and complied in every respect with its terms.

The Woodstock Iron Company complied with the contract only in part. At the request of the Extension Company it conveyed to the railroad company the several parcels of land mentioned, and also upon like request furnished it with cars to the value of $6,325. For the balance, amounting to $23,675, the present suit was brought, and the principal question presented to the court below, and to this court, is whether the contract is obligatory upon the defendant, or whether it is void as being against public policy.

In determining this question, it must be borne in mind that the contract of the Extension Company with the Georgia Pacific Railway Company was to locate and construct the road "by the nearest, cheapest and most suitable route from Atlanta, Georgia, through Alabama to Columbus in Mississippi, for the consideration of $20,000 a mile, and that it is averred in the pleadings and admitted by the demurrer, that in causing the road to be located by way of Anniston, it was necessary to deflect the same from the nearest and cheapest and most natural route between the designated termini, a distance of five miles, at an additional cost of $100,000. In the light of these facts there can be but one answer given to the question presented respecting the contract between the Iron Company and the Extension Company, namely: that it was a void contract, immoral in its conception and corrupting in its tendency. It was a contract by an employe of a railroad company with a third party, for a consideration to be received from that third party, to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest, and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer. The proposition of the Iron Company, which was accepted, was to pay the Extension Company for a breach of its duty. In plain language, it was nothing less than the offer of a bribe to the latter company to be faithless to its engagements, and to do with reference to the business in which it was engaged what would amount to little less than robbery of its employer. The transaction on the part of the Iron Company was none the less offensive, because of the threats of the Extension Company, made by its vice-president, who was also a director and stockholder of the railroad company, that, if the land and money mentioned were not donated, it would cause the road to be located away from Anniston by the rival town of Oxford. The threats did not excuse, much less justify, the offer.

We have thus far considered the case as one only between private parties, where an employe has agreed, for a money consideration, to violate his obligation to his employer; but there are other circumstances which add to the offensiveness of the transaction. The business of the Extension Company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction are private corporations; but whilst their directors are required to look to the interests of their stockholders, they must do so in subordination to and in connection with the public interests, which they are equally bound to respect and subserve. All arrange-

ments, therefore, by which directors or stockholders or other persons may acquire gain, by inducing those corporations to disregard their duties to the public, are illegal and lead to unfair dealing, and thus being against public policy will not be enforced by the courts. In this case the Extension Company, to which the duty of locating and constructing the railroad between its termini was intrusted, in agreeing, for a consideration offered by a third party, to disregard that duty and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by thus imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public.

The case of Fuller v. Dame is instructive on this head. (18 Pick. (Mass.) 472.) It there appeared that Dame, the defendant, was the owner of a large tract of land and flats situated on Sea street, and between it and Front street, on the south side of Boston, which would be greatly enhanced in value if the Boston and Worcester Railroad Company would locate one of its depots between those streets and easterly of Front street. To induce the company to make such location it was supposed to be necessary to form an association, which would pay to it a large sum of money and furnish a large tract of land for the depot, besides making other donations; and to provide the money and land, also to form a company to purchase the flats and land between the streets named, to be held as joint stock and laid out in due form and shape for sale. Fuller agreed to aid Dame in getting up such a company, and in inducing the railroad company to fix its termination and principal depot between those streets, Fuller being himself of opinion that the railroad ought, from a view of the public good and the good of its stockholders, to enter the city on the southerly side and have its principal depot there. In consideration of such agreement Dame gave his note for $9,600, payable to Fuller in three years, the note being deposited with third parties, to be delivered to him when the principal depot of the railroad company for merchandise was constructed between the streets mentioned. Fuller was at the time of the agreement a stockholder in the railroad company. The road having been completed, and the principal depot located between the streets mentioned, and the note not being paid, suit was brought upon it. It was adjudged that the contract was contrary to public policy, and that the note given in consideration of it was therefore void. In coming to this conclusion the court considered somewhat at large the ground upon which contracts of this character were avoided, and held that it was because they tended to place one under wrong influences, by offering him a temptation to do that which might injuriously affect the rights and interests of third persons, and that the case before it was within the operation of this principle, the contract tending injuriously to affect the public interest in establishing the fittest and most suitable location

for the termination of the Boston and Worcester Railroad for the accommodation of the public travel. It is true the road was constructed and located by the corporation at the expense of private parties under the sanction of the legislature, incorporated for that purpose, who were to be remunerated by a toll levied and regulated by law; and it was left to its directors to fix the termination and place of deposit. But the court added: "In doing this a confidence was reposed in them, acting as agents for the public, a confidence which, it seems, could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried, and had goods to be carried, that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests, to be affected and controlled by considerations having no regard to such interests. It is no answer to say that, by the act of incorporation, the executive authority was vested in a board of directors, and Mr. Fuller was not a director. He was a member of the company and might be chosen a director. He was an elector of the directors, and they were directly responsible to the stockholders. The immediate act of location was with directors, but the efficient authority was with the members and stockholders of the corporation, who elect the directors. The election may depend upon the known views and opinions of candidates upon this very question of location. They had a right to his disinterested judgment and advice upon the question of location; and this could not be exercised whilst he held and relied on a promise for a large sum of money, the payment of which depended upon this decision of the question by the directors."

The case before us is much stronger than the one thus decided by the Supreme Judicial Court of Massachusetts. There the contract was held invalid because made with a stockholder of the company, by which he promised, for a pecuniary consideration, to endeavor to procure the company to locate one of its depots at a particular place in the city. Here the contract was with an employe of the company, to induce it to disregard its obligations; and the principal person making that contract on the part of the employe was a director and stockholder of the company which was to be thus seriously affected.

The principle, which is so clearly and forcibly stated in Fuller v. Dame, has been applied in numerous instances by the highest courts

of different states, to avoid contracts made to influence railroad companies in selecting their routes and locating their depots and stations, by donations of land and money to some of its directors or stockholders or agents. Thus in Bestor v. Wathen, 60 Ill. 138, it appeared that in 1849 the legislature of Illinois incorporated a company to build a railroad from a point on the Mississippi river to Peoria, and that in 1852 the charter was amended so as to authorize the extension of the road from Peoria eastward to the state line. In 1855 the company made a contract with the firm of Cruger, Secor & Company, by which the latter undertook the construction and equipment of the road. In 1856, whilst engaged upon this work, the members of the firm, together with Bestor, the president of the railroad company, Sweat, one of its directors, and Smith, its construction agent, entered into a contract with Wathen and Gibson, the defendants, by which the latter, being the owners of 160 acres of land, agreed, in consideration that the road then in process of construction should cross the Illinois Central Railroad where their land was situated, the land would be laid out into town lots and sold, and after proceeds amounting to $4,800 had been received, which were to be retained by Wathen and Gibson, a conveyance of an undivided half of the residue should be made to the other parties. The only consideration for this agreement, aside from the location of the road, was that the other parties should assist and contribute to the building up of the town on the land. The road was constructed across the Illinois Central, and Wathen and Gibson laid out the land into lots and proceeded to sell the same, and the town of El Paso was built on the land and an adjoining tract. In 1863 the plaintiffs filed their bill against Wathen and Gibson for an account of the sales and a conveyance of the undivided half of the lots unsold. The court held the contract void as against public policy, and dismissed the suit, and the decree in this respect was affirmed by the supreme court of the state, that court observing that when the people through their legislature grants to a company the right of eminent domain for the purpose of constructing a railroad it is upon the supposition that the road will bring certain benefits to the public, and that when subscriptions are made to its stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders compatible with a proper regard for the public convenience; that these alone are the considerations which should control officers of the road; and so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public at large; and it added: "A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it. Such is the character of the

contract before us. If we enforce it we lend the sanction of the court to a class of contracts, the inevitable tendency of which is to make the officers of these powerful corporations pervert their trust to their private gain, at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now if this was the best line for crossing the Illinois Central considered with reference to the interest of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure to themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants, and the use of a false pretext in order to acquire defendants' property without consideration. If on the other hand this line was not the best, but was adopted because of this contract, the case is still stronger against the complainants. If such was the fact they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they are influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts, because of the great temptation they would offer to official faithlessness and corruption." The doctrine of this case was approved by the supreme court of Illinois in Linder v. Carpenter, 62 Ill. 309; and in St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592.

Holladay v. Patterson, decided by the supreme court of Oregon (5 Ore. 177), is also in harmony with Fuller v. Dame, and Bestor v. Wathen, the court following a similar course of reasoning to that adopted in those cases. That doctrine and reasoning are also often applied where the reward or money consideration for taking a particular route or establishing a station or depot at a particular place is offered directly to the railroad company instead of to its directors, stockholders, or agents. But we do not refer to them, because there are exceptions or qualifications in the application of the doctrine in such cases requiring explanation, as where a subscription is conditioned upon the adoption of a particular route, or the construction of a station or depot at a particular place. Pacific R. Co. v. Seely,

45 Mo. 212; Racine Co. Bank v. Ayers, 12 Wis. 512; Fort Edward & F. M. Pl. Road Co. v. Payne, 15 N. Y. 583. There is no exception in any decision called to our attention as to the character of a contract when for a pecuniary consideration directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the state, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies. As we said in Providence Tool Co. v. Norris, 69 U. S. 2 Wall. 48, 56, "that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution," so we say of agreements like the one in this case; they are against public policy because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution. "The law," as said in that case, "looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country." Oscanyan v. Arms Co., 103 U. S. 261, 274.

From the views expressed it follows that the court below erred in sustaining the demurrers to the special pleas above mentioned; and it is not necessary, therefore, to consider the other pleas. The judgment must be reversed and the cause remanded with instructions to overrule the demurrers to the above pleas, and take further proceedings not inconsistent with this opinion; and it is so ordered.

LYMAN v. SUBURBAN R. R. CO.

1901. 190 Ill. 320, 60 N. E. 515.

THIS was a bill in equity filed by appellant to recover an estate where a right of way was granted to appellee upon the express condition that it should erect and maintain depots at certain places, without any restriction as to location of other depots. Demurrer to bill sustained. Appeal.

HAND, J.— * * * This case is readily disinguished from that class of cases which hold contracts made by the officers and agents of railroad companies for their own gain, whereby they agree to secure the location of stations, depots, etc., at particular places (Bestor v. Wathen, 60 Ill. 138; Linder v. Carpenter, 62 *id.* 309); or whereby it is stipulated for the location of stations, depots, etc., at particular places and prohibiting the location or erection of any others within certain prescribed limits (Marsh v. Fairbury, Pontiac and Northwestern Railway Co., 64 Ill. 414; St. Louis, Jacksonville and Chicago Railroad Co. v. Mathers, 71 *id.* 592), to be void as against public policy.

In C., C. & I. Ry. Co. v. Coburn, 91 Ind. 557, it was held a conveyance to a railroad company of the right of way for its road, the consideration of which is shown to be the construction and permanent maintenance of the road upon the line so granted and the erection and maintenance of its depot upon adjoining lands, is upon condition subsequent, and if such depot and track be afterwards abandoned it is a breach of the condition, which defeats the grant. On page 562 it is said: "In determining the question whether the estate granted is one upon a condition subsequent, the court will seek to enforce the intention of the parties, to be gathered from the instrument and the existing facts. (4 Kent's Com. 432, 2 Parsons on Contracts 479; Chitty on Contracts 74; Horner v. Chicago, etc., Railway Co., 38 Wis. 165). We therefore think that the relinquishment in controversy created in the railroad company an estate upon condition subsequent, liable to be defeated upon the non-performance of the condition."

In Horner v. Chicago, Milwaukee and St. Paul Railway Co., 38 Wis. 165, a deed of land to a railroad company (reciting a consideration of one dollar) conveyed one parcel "only for depot and other railroad purposes" and another parcel adjoining the former "for a railway," and recited that both parcels were "granted solely for said road purposes." In ejectment for said parcels of land it was shown by parol evidence that no money was paid for the land, and that the only consideration for the conveyance was the condition that the railway depot should be erected on the land, the effect of which the grantor believed would be to enhance the value of her other lands in the vicinity for building purposes. On page 176 the court say: "The considerations above mentioned, and other features of the case not specially referred to, convince us that the grantor intended to convey the land upon the condition that if the grantee failed to construct the railway and locate and erect the depot thereon she should have power to destroy the estate of the grantee in the land by re-entry or its equivalent, and re-vest the title thereto in herself. We think, also, that the language of the deed admits of a construction which will effectuate that intention, and we cannot hesitate so to construe it."

In Gray v. Chicago, Milwaukee and St. Paul Railway Co., 189 Ill. 400, John and George Gray conveyed a strip of land to the Chicago, Milwaukee and St. Paul Railway Company for right of way purposes, for the expressed consideration of one dollar. The deed contained the following conditions: "This conveyance is made upon the express conditions that said railway company shall maintain a passenger depot at the place where the passenger depot of said company is now located and erected on said premises, and stop thereat all its accommodation trains to take and leave passengers. In the event of the party of the second part, its successors and assigns, shall fail to perform and fulfill all the above requirements and conditions, all the lands above described and herein conveyed to the party of the second part shall revert to the parties of the first part, their heirs, administrators or assigns." Ejectment was brought to recover the land upon the ground that the conditions of the deed have been violated by the company failing to stop an accommodation train to take and leave passengers. The trial court took the case from the jury. This court, on appeal, reversed and remanded the cause, and held the court was not authorized to say, as a matter of law, that the conditions contained in said deed were illegal and void, as against public policy.

The supreme court of Indiana, in the case of Louisville, New Albany and Chicago Railway Co. v. Sumner, 106 Ind. 55 (5 N. E. 404), in an exhaustive review of the authorities bearing upon conditions of the character under consideration, on page 406 say: "Was the stipulation in the deed 'to locate and maintain a depot' on the line between the several tracts over which the right of way was granted, void? Agreements of the character under consideration, so far as they have become the subject of judicial interpretation, are of three classes. There are those in which stipulations are contained providing for the location of stations or depots at particular places and prohibiting the location or erection of any others within certain prescribed limits. Concerning all such agreements as contain restrictive stipulations by which the railway company undertakes to prohibit itself from thereafter erecting other station houses or depots at other places or within prescribed limits, they are uniformly, so far as we know, held to be void, as against public policy. Railroad corporations are regarded as public agencies, owing duties to the public, generally. They are therefore not authorized to make any contract which may prevent them from discharging their duties efficiently to the public, and for that reason they cannot contract that the company will not locate a station or erect a depot at a place where the demands of business or concentration of population may at some time in the future require it. Such a contract is void, as against public policy. (Williamson v. Railroad Co., 53 Iowa 126; s. c. 4 N. W. 870; Railroad Co. v. Mathers, 104 Ill. 257; Marsh v. Railway Co., 64 *id.* 414; Railroad Co. v. Mathers, 71 *id.* 592; Railway Co. v. Ryan, 11 Kan.

602.) Another class of cases are those in which some officer or other person, supposed to be influential with a railway company, undertakes, for a consideration moving to them, to secure the location of stations, depots, etc., at a particular place. A conspicuous case in this class is Fuller v. Dame, 18 Pick. (Mass.) 472. All such contracts are void, as against public policy. (Bestor v. Wathen, 60 Ill. 138; Linder v. Carpenter, 62 *id.* 309.) Still another class is that to which the case under consideration is allied. Such are the cases in which an agreement has been made between an individual and a railway corporation for the location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, without any restriction or prohibition against any other location. No case has fallen under our notice in which this question was directly involved and which was not controlled by other considerations which condemn such an agreement. On the contrary, it has been held that an agreement to pay a railway company a stipulated sum in consideration that it would locate its route at a particular place is valid and may be enforced. (First Nat. Bank v. Hendrie, 49 Iowa 402; Railroad Co. v. Baab, 9 Watts (Pa.), 458.) So a conditional subscription of stock is valid. (Railroad Co. v. McCormick, 10 Ind. 499; Jewett v. Railroad Co., *id.* 539.) A voluntary grant to a railroad on condition that it would locate its route and establish a depot at a certain place was sustained, as not being in contravention of public policy. McClure v. Railroad Co., 9 Kan. 373. * * * The decree of the superior court of Cook county will therefore be reversed and the cause remanded to that court, with directions to overrule the demurrer and proceed to the disposition of said cause, in accordance with the views herein expressed.

Reversed and remanded.

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§ 65 (C)—Obstructing the Course of Public Justice.

PARTRIDGE v. HOOD.

1876. 120 Mass. 403.

ACTION on contract. The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son. At the trial the judge ruled that the agreement was illegal and void, and ordered judgment for the defendant. The plaintiff alleged exceptions.

GRAY, C. J.—The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted

as applied to felonies, and the English authorities before our Revolution extended it to all crimes. 2 West Symb. Compromise & Arbitrament, § 33; Horton v. Benson, 1 Freem. 204; Bac. Ab. Arbitrament & Award, A.; Johnson v. Ogilby, 3 P. Wms. 277, and especially the register's book cited by Mr. Cox in a note to page 279; Collins v. Blantern, 2 Wils. 341; 4 Bl. Com. 363, 364. An appeal of mayhem could be barred by arbitrament, or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the crown, and subjected the appellee to damages only, like an action of trespass. Blake's Case, 6 Rep. 43b, 44c, 2 Hawk., c. 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord Kenyon. * * *

In Jones v. Rice, 18 Pick. (Mass.) 440, 442, Mr. Justice Putman, delivering the opinion of this court, after alluding to the English cases in the time of Lord Kenyon, relied on to "sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful," said: "We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offense, he might extort, for his own use, money which properly should be levied as a fine upon the criminal party for the use of the commonwealth."

It is true that the prosecution in Jones v. Rice was for a riot as well as for an assault. But the language and the reasoning of the opinion extend to the compounding of any offense whatever. Any act which is made punishable by law as a crime is an offense against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority. Hinds v. Chamberlin, 6 N. H. 225; Shaw v. Spooner, 9 N. H. 197; Shaw v. Reed, 30 Me. 105; Bowen v. Buck, 28 Vt. 308; People v. Bishop, 5 Wend. (N. Y.) 111; Noble v. Peebles, 13 S. & R. (Pa.) 319, 322; Maurer v. Mitchell, 9 W. &. S. (Pa.) 69, 71; Cameron v. McFarland, 2 Car. Law Repos. 415; Corley v. Williams, 1 Bailey (S. Car.) 588; Vincent v. Groom, 1 Yerger (Tenn.) 430; Met. Con. 226, 227; 1 Story Eq. Jur. § 294. * * *

Exceptions overruled.

COLUMBIA LODGE v. MANNING.

1897. 57 N. J. Eq. 338, 38 Atl. 444.

EMERY, V. C.— * * * The question here is whether, in the absence of pending criminal proceedings or of an indictment, sufficient proof must be made in the case that in fact the crime had been committed, or whether the mere intention of the parties to compound what is charged or supposed to be a crime is sufficient to avoid a security given for a debt which is honestly due. Defendant's counsel claim that the security is avoided simply by the illegal or criminal intention of the parties to compound a crime, and that the agreement not to prosecute, founded on this intention, is sufficient to invalidate the security. The authorities, however, are against this view, and hold that, where criminal proceedings are not pending, the actual commission of the crime alleged to have been compounded must be alleged and proved. The cases are collected in 3 Am. & Eng. Ency. Law 404, the leading case being Bank v. Mathewson (1843), 5 Hill (N. Y.) 249. This was an action on a bond, and a plea in bar alleged that the bond was given under an agreement to discharge a person—one Washburn—arrested by plaintiffs under civil process founded on a charge of obtaining money on a forged note, and to surrender the note, discharge the person arrested, and forbear to prosecute him for forgery. The plea failed to aver that the crime of forgery had been in fact committed, and, in the absence of any pending criminal proceedings, the plea was held no answer to the action, the court saying that it was not possible to sustain the plea if it came short of averring the actual commission of the crime. The doctrine settled by this case is that, where no criminal proceedings are actually pending, the actual commission of the crime alleged to have been compounded is one of the facts at issue in the cause, and necessary to be alleged, and satisfactorily proved, in order to make out the defense of illegality. The same doctrine is held by the later cases. Plant v. Gunn (1874), 2 Woods (U. S.) 372, 19 Fed. Cas. 800, 803; Catlin v. Henton (1859), 9 Wis. 476. * * *

BRITTIN v. CHEGARY.

1846. 20 N. J. L. 625.

THE claim of the plaintiff was founded on a promissory note made and given to him by the defendant. The defendant set up as a defense, that the note was void, because given for an unlawful consideration, to wit, for the purpose of stifling a prosecution against the defendant for forgery. Exceptions were taken by the defendant to the charge of the chief justice as to what constitutes the offense.

CARPENTER, J.— * * * In relation to this point, I apprehend, the charge is substantially correct. An agreement not to prosecute, or in some other way to favor or protect the criminal, is an essential ingredient in the offense of compounding crime. The bare taking of one's own goods again, which have been stolen, or other amends, is no offense at all, unless some favor be shown to the thief; otherwise it is, if he receive them on an agreement not to prosecute. 4 Bl. Com. 133; 1 Hawkins by Carwood 73; 1 Hale's P. C. 546, 619. The application of this principle, to the case, where amends have been made to the person injured by a forged bill or other security, is obvious; the substitution of a good bill for a forged bill or the payment of the forged bill, if unaccompanied by any stipulation to suppress evidence or to stifle a prosecution, has never been held to be unlawful. No case has been produced, and I suppose no case can be produced, in which substitution or payment, independent of any agreement to conceal the offense or to forbear a prosecution, has been held to avoid the subsequent security so received; or to expose the person receiving such security or payment, to the penalties incident to misprision of felony. Wallace v. Hardacre, 1 Camp. 45, and Ward v. Allen, 2 Metcalf (Mass.) 53, are express authorities to the contrary. Without going further than is necessary for the decision of this cause, it is now sufficient to say, that the mere substitution of a note in the place of a prior note alleged to have been forged, independent of proof, express or inferential, of a corrupt agreement, will not invalidate the subsequent security. The case seems to me to have been fairly put to the jury, and I am of the opinion that the circuit court should be advised to render judgment for the plaintiff in accordance with the verdict.

Circuit court advised to render judgment on the verdict.

GOODRICH v. TENNEY ET AL.

1893. 144 Ill. 422, 33 N. E. 44.

THIS was a proceeding in equity on an agreement between appellant, and appellee, Tenney, an attorney; representing creditors of an absconding debtor, one Smith, that appellant would procure for the attorney the affidavits of the debtor and two other persons, showing that a sale made by the debtor to one Lowey was fraudulent and without consideration, to be used on a motion for a new trial in a case on a creditor's bill and also the deposition or testimony of such debtor and two other persons to the same effect to be used in said litigation for which appellant was to be paid twenty-five per cent of the debt so collected.

SHOPE, J.— * * * The right of recovery, if it exists, is predicated solely upon and involves the enforcement of the contract set up in the bill. It is under and by virtue of that contract alone, that it is sought to establish appellant's right to the money, and there is nothing, except said agreement, that would give him any right, either at law or in equity, to demand the payment of the twenty-five per cent of the amount collected of Lowey.

The English reports, as well as American, abound with cases holding that contracts are illegal when founded upon a consideration, *contra bonos mores,* or against the principles of sound public policy, or founded in fraud, or in contravention of the provisions of some statute, (2 Kent's Com., p. 466); and we need not review the cases illustrating the application of the rule. Thus, contracts to pay money to influence legislation (Marshall v. B. & O. R. R. Co., 16 How (U. S.) 314; Mills v. Mills, 40 N. Y. 543; McBratney v. Chandler, 22 Kan. 692; Bryan v. Runnels, 5 Wis. 200; Powers v. Skinner, 34 Vt. 366); agreements founded upon violations of public trust or confidence (Cooth v. Jackson, 6 Vesey 12-35); contracts to pay public officers for the performance of official duty (Odineal v. Barry, 24 Miss. 9); contracts for the buying, selling or procuring of public office (Chesterfield v. Jansen, 4 Atk. 352; Boynton v. Hubbard, 7 Mass. 119; Waldon v. Martin, 4 B. & Cress. 319); agreements for the purpose of stifling criminal prosecution (Gorham v. Keyes, 137 Mass. 583; Henderson v. Palmer, 71 Ill. 579; Richet v. Harvey, 106 Ind. 564; McMahon v. Smith, 47 Conn. 221; Roll v. Raguet, 4 Ohio 400); agreements relating to civil proceedings involving anything inconsistent with the full and impartial course of justice therein (Dawkins v. Gill, 10 Ala. 206); or that tend to pervert the course of justice or its pure administration by the courts (Gillett v. Logan Co. et al., 67 Ill. 256; Patterson v. Donner, 48 Cal. 369), and many others, are justly deemed contracts of turpitude, contrary to sound public policy and void. 1 Story's Eq. Jur., §§ 293-300; 3 Am. & Eng. Enc. of L. 875-881, and notes. In Gillett v. Logan Co., *supra,* the contracts were to pay for procuring testimony showing that a certain number of votes cast at an election were illegal, and we said that: "On account of their corrupting tendency we must hold them to be void as inconsistent with public policy." It was also there said, in effect, that such contracts created a powerful inducement to make use of improper means to procure the testimony contracted for, to secure the desired result; that they led to the subornation of witnesses, to taint with corruption the atmosphere of courts and to pervert the course of justice. In Patterson v. Donner, *supra,* it was agreed among other things that a certain sum of money should be paid, etc., provided the party procured "two witnesses to testify that they had seen what purported to be a genuine grant" of the land mentioned, etc., and it was held that the stipulation was immoral, against public policy and void.

Courts of justice will not enforce the execution of illegal contracts, nor aid in the division of the profits of an illegal transaction between associates. Newstadt v. Hall, 58 Ill. 172. It is there said: "In the language of Lord Ellenborough in Edgar et al. v. Fowler et al., 3 East 222, we will not assist an illegal transaction in any respect; we leave the matter as we find it and then the maxim applies, *melior est conditio possidentis.*" It may be insisted that it is unjust as between the parties for Tenney to raise the question, and very dishonest toward appellant for him to take advantage of it, but the contract being illegal no rights can be enforced under it. As said by Lord Mansfield, in Halman v. Newland, Cowper 417, "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act." The maxim *ex turpi contractu non oritur actio* applies in all such cases, and neither party, if *in pari delicto,* can have assistance from courts of justice in enforcing the contract. And the objection may be made by a party *in pari delicto,* for the defense is not allowed because the party raising the objection is entitled to the relief, but upon principles of public policy and to conserve the public welfare.

No better illustration can perhaps be found of the soundness and wisdom of the rule, and the dangers to be apprehended from its relaxation, than is shown in this case. It is apparent that Lowey was in equal peril of recovery against him, whether he had paid full and honest value upon purchase of the goods from Smith, or had taken them in fraud of the rights of the creditors. Smith, a dishonest debtor, after cheating his creditors, absconded. The appellant, as alleged, in consideration of the agreement of Tenney to pay him twenty-five per cent, practically, of whatever should be collected from Lowey, undertook and agreed to procure the affidavit of said Smith, of one Fuller with an *alias,* and one Moies "of the facts of the sale by Smith to Lowey, showing clearly that no consideration was paid by Lowey, and that he knew of Smith's insolvency," "and that the testimony of said witnesses, either in person or by deposition, should be given of like tenor," etc. Copies of the affidavits alleged to have been furnished, and which, it is alleged, were received as a satisfactory fulfillment of appellant's contract in that regard, are attached to the bill as exhibits, and show that the witnesses testified up to the high mark set by the contract. Smith was brought back from Canada, secured immunity from arrest for his fraud, his debts cancelled, if he would testify as required, and it is apparent from the bill that he at least claimed a portion of the money, and was actually paid $14,000; and this under the direction and control, if the bill be true, of an attorney who deliberately laid the foundation for the commission of perjury with safety by himself, if called to testify, and advised the commission of perjury by appellant, and framed the language in which he should commit it. And the testimony was procured by appellant, who, after planning with the attorney as to the

wording of his false testimony, deliberately gave it, for no other reason, than that he was led to believe that his telling the truth, would endanger the chances of success in the litigation against Lowey. If transactions of this kind should receive sanction, and contracts based upon them be enforced, the suborner of perjury would become a potent, if not a necessary, factor in litigation. The fact that purchase was made in good faith would be no protection to the buyer; premium would be offered to the dishonest and unscrupulous, and would result in the perversion of justice and bringing its administration into deserved disrepute. It is not enough that the parties may have intended no wrong, or that the testimony produced in the case may have been true, it is the tendency of such contracts to the perversion of justice, that renders them illegal. It is perhaps a singular fact, however, though unimportant, that this bill nowhere alleges that either the attorney or appellant believed, or had any reason to believe, the testimony of Smith was in fact true. That, so far as this bill goes, seemed to have been a matter not considered.

That this contract falls directly within the maxim before quoted is unquestionable; and by all the authorities the courts can do nothing to enforce it by either party.

But it is said that Tenney having received the money must account for it to appellant. And, we are referred by counsel to a line of cases, holding that although money may have been realized in an illegal transaction, yet where the liability of the defendant to pay it to the plaintiff arises upon some new or independent consideration, unaffected with illegality, and the enforcement of the illegal contract is not involved, there may be a recovery. None of the cases referred to have any application to the case at bar. As said in Dent v. Ferguson, 132 U. S. 50, in commenting upon this line of cases: "In all those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them do not trench upon the line which separates the cases of contracts void in consequence of their illegality, from new and subsequent contracts arising out of the accomplishment of the illegal object, is not the subject of inquiry here." It is to be remembered, the contract was, as alleged, with the defendant, D. K. Tenney, and signed by him, and who collected the money of Lowey as trustee for the creditors of Smith. If the money had been paid to a third person for the use of appellant, or there were collateral circumstances, disconnected with the illegal contract out of which an implied promise to pay the money to appellant would arise, the cases referred to would apply. But the fact that Tenney received the money upon the decree against Lowey would, independently of the contract, raise no implied assumpsit in appellant's favor.

The controversy here arises between the parties to the illegal agreement, and appellant must, if at all, assert his claim to the money

in Tenney's hands, through and under that contract. Treat that as void, as if never made, and there is nothing upon which appellant can base a claim to the money. * * * The bill was properly dismissed.

Judgment affirmed.

OUSTING THE JURISDICTION OF THE COURTS.

MILES ET AL. v. SCHMIDT.

1897. 168 Mass. 339, 47 N. E. 115.

MORTON, J.—Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases. But the law has settled otherwise in this state. Rowe v. Williams, 97 Mass. 163; Wood v. Humphrey, 114 Mass. 185; Pearl v. Harris, 121 Mass. 390; Vass v. Wales, 129 Mass. 38; White v. Railroad Co., 135 Mass 218. When the question is a preliminary one, or in aid of an action at law—such, for instance, as the ascertainment of damages—an agreement for arbitration will be upheld. Reed v. Insurance Co., 138 Mass. 575; Hutchinson v. Insurance Co., 153 Mass. 143, 26 N. E. 439; Wood v. Humphrey, *supra*. The defendant contends that the agreement for arbitration in this case goes no further than the assessment of damages. But it is expressly provided, among other things, that the referee shall "hear the parties, and determine whether or not there has been any violation of the agreements herein contained, * * * and what damage either party has sustained" thereby, and that "the decision of a majority of said referees shall be final and binding on said parties." The evident intent is to submit all disputes relating to the performance of the agreement to the final decision of a tribunal constituted by the parties themselves. The referees are not only to assess the damages, but also are to determine whether there have been any violations of the agreement, and their decision in all matters is to be final. The agreement to submit to arbitration was therefore in violation of law.

NIAGARA FIRE INS. CO. v. BISHOP.

1894. 154 Ill. 9, 39 N. E. 1102.

MAGRUDER, J.—* * * A general covenant in a policy of insurance to submit every matter in dispute to arbitration is held to be no bar to a suit for damages, and to be invalid as an attempt to oust the courts of their jurisdiction. But an agreement, which pro-

vides for the determination of amounts or values, is lawful and may be made a condition precedent to the right of recovery, either in terms, or by necessary implication. (May on Ins., § 493; Wood on Ins., § 493; Saucilito L. & D. D. Co. v. C. U. A. Co., 66 Cal. 253; Hanover Fire Ins. Co. v. B. C. Lewis & Sons, 28 Flor. 209.) Such agreements do not oust the courts of their jurisdiction, and, where the contract is, that no suit shall be maintained until an award is made fixing the amount of the claim, the contract will be respected by the courts. (Chippewa Lumber Co. v. Phœnix Ins. Co., 80 Mich. 118; Adams v. Ins. Co., 70 Cal. 198; Wolff v. L. & L. & G. Ins. Co., 50 N. J. L. 453.) * * *

In Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, where the policy contained a stipulation, that differences as to the amount of any loss or damage should be submitted to two competent and impartial persons, chosen one by each party, and the two so chosen to select an umpire in case of disagreement, and the award of any two of them in writing to be binding and conclusive as to the amount, just as, in the case at bar, it is provided that "the award in writing of any two shall determine the amount of such loss," the supreme court of the United States, speaking through Mr. Justice Gray, said: "Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. Scott v. Avery, 5 H. L. Cas. 811; Viney v. Bignold, L. R. 20 Q. B. Div. 172; Delaware and H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Washington F. & M. Ins. Co., 138 Mass. 572, 576; Wolff v. Liverpool & London & G. Ins. Co., 50 N. J. L. 453; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 114. The case comes within the general rule long ago laid down by this court: 'Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. United States v. Robeson, 9 Pet. (U. S.) 319.'"

BIRMINGHAM FIRE INS. CO. v. PULVER.

1888. 126 Ill. 329, 18 N. E. 804.

BAILEY, J.—* * * The policy provides that, "in case differences shall arise touching any loss or damage, after proof of these has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose

award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy." There is no condition in the policy that the loss should not be payable until such arbitration and award should be had, or in any way making a submission to arbitration a condition precedent to the payment of the loss. The promise to pay, and the provision making such payment conditional upon the production of proofs, etc., are in a preceding part of the policy, and are in no way incorporated with or made dependent upon the condition in relation to arbitration.

A condition in a policy providing for an arbitration cannot operate to deprive the insured of his right of action, unless clearly made a condition precedent to the existence of such right. Liverpool, London and Globe Ins. Co. v. Creighton, 51 Ga. 95; Patterson v. Triumph Ins. Co., 64 Me. 500; Roper v. Lendon, 1 Ell. & Black. 825; Gore v. Council Bluffs Ins. Co., 67 Iowa 272; Reed v. Washington Fire and Marine Ins. Co., 138 Mass. 572; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419; German-American Ins. Co. v. Steiger, 109 Ill. 254. * * *

BIERBAUER v. WIRTH ET AL.

1880. 10 Biss. (U. S.) 60, 5 Fed. 336.

DYER, D. J.—The question to be determined in this case arises on a motion for a new trial. The action is one brought by the plaintiff to recover for services rendered and disbursements alleged to have been made by him between the first day of April, 1875, and the first day of December, 1876, for the defendants, who were the managers of a rectifying and redistilling establishment at Milwaukee. At the trial, it was disclosed by the evidence introduced on the part of the plaintiff that about the first day of April, 1875, he was employed as a bookkeeper at the defendants' place of business; that he rendered legitimate services as such bookkeeper from that day until the tenth day of May, 1875, when the defendants' establishment, together with a large number of distilleries and rectifying houses in Milwaukee, were seized by the government for frauds upon the revenue. It appeared from the testimony given by the plaintiff himself that in the evening of the day of the seizure he made an arrangement with the defendants, or some of them, by which he was to go out of the jurisdiction of this court, so that he could not be reached by its process, and his attendance compelled as a witness in behalf of the government and against the defendants, in forfeiture and criminal proceedings, which it was expected would follow the seizures, and that he should remain away until such proceedings should be terminated. It appeared, further, that the defendants promised

him that in consideration of such service the salary agreed to be paid him in his original employment should continue, and that all expenses he might incur during his absence, and consequent upon carrying out the arrangement on his part, should be repaid to him. Pursuant to this understanding, and more or less under the direction of the defendants, plaintiff immediately went away, and thereafter traveled in various parts of the United States and Canada, sometimes under an assumed name, and sometimes not, and thus continued absent, for the purpose of avoiding the process of this court, until December, 1876, when he returned. Most of the services and disbursements, for which this suit was brought, are those which the plaintiff claims he thus rendered and paid during that period of his absence under the circumstances mentioned.

At the trial it was held that the contract between the plaintiff and defendants, except for the service actually rendered as bookkeeper between April 1 and May 10, 1875, was one which, if executed, tended to obstruct the course of public justice; that, consequently, it could not receive judicial sanction, or even toleration, and that the plaintiff could not recover either for the service he rendered the defendants in thus avoiding the jurisdiction and process of the court, nor the moneys he expended in carrying out such an unlawful enterprise. On the argument of the present motion it is not contended that there was any error in the ruling of the court as to the plaintiff's claim for services. Indeed, the case in its facts and circumstances, as disclosed by the plaintiff himself, is so flagrant that there can be, and ought to be, no ground upon which to base a right to recover for such a service. "Courts owe it to public justice, and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to turn a suitor, upon such a contract, out of court, whenever and however the contract is made to appear." Wight v. Rindskopf, 43 Wis. 348; see also, Badger v. Williams, 1 Chipman (Vt.) 137, and Valentine v. Stewart, 15 Cal. 387. * * * The whole transaction was illegal, and the plaintiff having thus voluntarily put himself in a position where he was exposed to the liability of loss, he cannot ask the court to extricate him from that position.

Motion for a new trial denied.

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§ 65 (D)—Encouraging Litigation.

Maintenance is where a person officiously intermeddles in a suit that in nowise belongs to or concerns him by maintaining or assisting either party with money or otherwise, to prosecute or defend the suit.

But it is not considered maintenance for a man to maintain the suit of his kinsman or servant or any poor person out of charity. 4 Bl. Comm. 134, 135; Rev. St. Ill., ch. 38, § 27.

THOMPSON v. REYNOLDS.

1874. 73 Ill. 11.

THIS was an action brought on a contract between an attorney and client whereby the attorney was to institute and prosecute suits at his own expense for the recovery of property belonging to and claimed by the client for which his only compensation was to be a portion of the property recovered. Judgment for plaintiff. Appeal.

WALKER, C. J.— * * * The court was asked to instruct the jury that the agreement entered into was champertous and void, but the court below refused to give the instruction. Blackstone defines champerty (vol 4, p. 135), as "a species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire,* to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense." The same author informs us that the punishment, if a common person, for champerty, was by fine and imprisonment—and this was a misdemeanor, punishable at the common law. See Hawk. Pleas of the Crown, vol. 1, p. 463. It was also prohibited by various ancient statutes, commencing as early as the Statute of Westminster 1, ch. 25, all of which enact heavy penalties for their violation.

It thus appears, that champerty was an offense at the common law, and our general assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed, this must be regarded as in force in this state, as affecting all such contracts, and as being opposed to sound public policy. It is certainly applicable to our condition so far as it relates to attorney and client, and contracts with intermeddlers and speculators in apparently defective titles to property. If allowed to be practiced by attorneys, it would give them an immense advantage over a client. The superior knowledge of the attorney of the rights of the client, would give him the means of oppression and acquiring great and dishonest advantages over the ignorant and unsuspecting owner of property. By giving false advice, the attorney, owing to the confidence his client reposes in him, and to his superior knowledge, would have the client completely at his mercy, and would thus be enabled to acquire the client's property in the most dishonorable manner. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession, that would, from the very nature of things, lead to great abuses and oppression.

Whilst the great body of the profession are honest, and understand and act on the duties devolving upon them, there necessarily must be, in this as in all ages of the past, some who gain admission

that have neither the integrity nor sense of duty necessary to restrain them from dishonorable means in practice. Usually a person will not employ an attorney unless he feels assured of his honesty as a man as well as his ability as an attorney. Having this confidence, all must see at a glance that it would give the attorney immense power over the client, and with this power all must see that to permit him to make champertous contracts would be to place the client in the power of the attorney. Professional duty requires that advice given should be honest, fair and unreserved; but where the weak in morals or the vicious are consulted, and they see and determine to embrace the opportunity to make a champertous contract, how can we expect them to give fair, honest and unreserved advice at the commencement, or in conducting this litigation? The just, the good and upright require no restraints, but the vicious or immoral should be freed from temptation.

At all times, in the past, champerty has been found a source of oppression and wrong to the property owner, and a great annoyance to the community. To allow it to attorneys, with a portion, but it is believed the number would be small, there would be strong temptation to annoy others by the commencement of suits without just claim or right, merely to extort money from the defendant in buying his peace. Such practices have been denominated as a crime *malum in se*. And such extortion from others, or by the oppression of a client, is unquestionably a great moral delinquency, that no government regardful of the rights of its citizens should ever tolerate. We see that it is as liable now to abuse as it ever was, and would be as injurious to our community as to other communities in the past. And this court has repeatedly held that common law misdemeanors may be punished in this state, unless abrogated by statutory enactment.

Then, has this common law offense been repealed? We think not. The general assembly has defined the offenses of barratry and maintenance, but the offense of champerty is not named; and as, at common law, all three of these offenses were regarded as separate and distinct, and as the British parliament enacted separate laws in reference to each, and as they were enforced by distinct proceedings, we may regard them as different offenses, although champerty is said to be a species of maintenance. Then, if the 108th (27th) section of the Criminal Code would not embrace this offense, it is in force as a common law misdemeanor, and we do not see that it does. * * *

This court has held in Gilbert v. Holmes, 64 Ill. 548, and Walsh v. Shumway, 65 Ill. 471, that similar contracts were tainted with champerty, and could not be enforced.

According to the doctrine of the cases of Scoley v. Ross, 13 Ind. 117, there can be no question that this contract is champertous, according to the doctrine of the courts of this country. That case

refers to and reviews a large number of American decisions on this question, and carries the doctrine to the full extent of the English rule.

It was the policy of the common law to protect persons from harassing and vexatious litigation. Hence, it would not permit a person having no interest in the subject matter of the litigation to intermeddle or to become interested in the suit of another, unless it was an attorney, who could only have and demand a fee for his services, and that not in a portion of the thing in dispute. In the absence of such a rule, great wrong would necessarily be inflicted on community.

On a consideration of all the authorities, we are clearly of opinion that this contract, however honestly entered into and carried out, was void, and that the judgment of the court below should be reversed and the cause remanded.

Judgment reversed.

GEER v. FRANK.

1899. 179 Ill. 570, 53 N. E. 965.

THIS was a bill in equity in an agreement by an attorney to prosecute a suit on a contingent fee, where part of the consideration for his undertaking was that another attorney should render his services and bear the expense and costs of litigation.

CARTWRIGHT, J.— * * * Disregarding all other questions argued, we are of the opinion that the agreement is illegal and void. It was said in Newkirk v. Cone, 18 Ill. 449, that the common law of champerty had been abolished in this state, but this statement was corrected in Thompson v. Reynolds, 73 Ill. 11, where it was said the former decision was manifestly a mistake, and that the question was not involved in such former decision, the champertous agreement having been abandoned by the parties by mutual consent. The law of champerty has been somewhat qualified by our decisions, but it is a part of the law of the state. We have held, in consonance with the great weight of modern authority, that an attorney may make an agreement for contingent fees of a legitimate character, by which he is to receive a certain share or part of the money or thing recovered. (West Chicago Park Comrs. v. Coleman, 108 Ill. 591; Phillips v. South Park Comrs., 119 *id.* 626.) In such a case he has no interest in the litigation except that of an attorney and to the extent of his legal services, and if such a contract is not against conscience and reasonable in its terms, a court of equity would doubtless enforce it. The law, however, does not permit a person having no interest in the subject matter of a suit to become interested in it and concerned in its prosecution, and an agreement by which such person, although an attorney, agrees to bear expense and costs of litigation falls

within the definition of champerty, and will not be enforced, either at law or in equity. (Gilbert v. Holmes, 64 Ill. 548; Thompson v. Reynolds, *supra.*) Under these rules the agreement between Bennett and Frank was champertous, and the undertakings of Geer and Bennett were so mutually dependent upon each other, as a consideration for the agreement of Frank, that the whole contract was tainted with illegality. The considerations for Frank's promise were the agreement of Geer to render legal services in conjunction with Bennett, Bennett's agreement to render legal services in conjunction with Geer, and Bennett's agreement to pay the costs and expenses. The agreement could not be performed and Geer render the services which he promised except by Bennett carrying out his champertous agreement, and it was so executed. The undertakings cannot be separated, and one of the considerations inducing the promise of Frank being illegal, the entire contract is void and a court of equity will not aid in its enforcement.

TORRENCE v. SHEDD ET AL.

1885. 112 Ill. 466.

MULKEY, J.— * * * Even conceding the agreement to be champertous, we do not think appellees can avail themselves of it as a defense to this suit. While the cases are not all in accord on this question, we think the decided weight of authority sustains the position that champerty cannot be made available as a defense in a mere collateral proceeding, as is sought to be done here. Fetrow v. Merriwether, 53 Ill. 275; Boone v. Clules, 10 Pet. (U. S.) 219; Hillon v. Woods, L. R. 4 Eq. 432; Knight v. Bowyer, 2 De G. and J. 444; Coleman v. Billings, 89 Ill. 187. This question cannot properly arise except in a controversy between the parties to the alleged champertous agreement, or their privies. * * *

CHICAGO CITY RY. CO. v. GENERAL ELECTRIC CO.

1897. 74 Ill. App. 465.

WINDES, J.— * * * Conceding that the allegations of the bill sufficiently show that the several suits specifically mentioned, and also those threatened, are without any valid basis and without any lawful right or claim on the part of the several plaintiffs and complainants

(of which we have serious doubt), still it is not alleged that appellant has no legal or equitable right nor interest in such suits, and for aught that appears from the bill, except, perhaps, as it may be inferred, appellant has an interest in said suits and a perfect right legally and equitably to maintain all or any of them, or to cause others to be commenced against appellee. It is elementary that every pleading is to be taken most strongly against the pleader. It is not maintenance to assist in a public prosecution. Masters v. Miller, 4 Term Rep. (Durnf. & East) 320; Commonwealth v. Dupuy, Brightly's Rep. (Penn.) 44.

Nor is it maintenance when the person promoting the suit of another has a legal or equitable interest in the thing demanded distinct from that which he may acquire by agreement with the suitor. 3 Am. & Eng. Ency. of Law, 76; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623; Findon v. Parker, 11 Mee. & Wel. 675; McCall v. Capehart, 20 Ala. 521; Gilman, Sons & Co. v. Jones, 87 Ala. 691, and cases cited; Call v. Calef, 13 Met. (Mass.) 362. * * *

In some of the states the rules as to maintenance and champerty are unsettled or limited, discarded, or do not prevail except so far as preserved by statutes. See Benjamin "Principles of Contract," p. 267.

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§ 65 (E)—Involving Sexual Immorality.

EDMONDS v. HUGHES.

1903. 115 Ky. 561, 74 S. W. 283.

JUDGMENT for defendant. Appeal.

BARKER, J.—The appellee, Flora Edmonds, instituted this action in the Todd circuit court to recover damages of the appellee for a breach of his contract to marry her. The facts stated in the petition constitute a valid cause of action. Appellee, in his answer, admits his promise to marry appellant as alleged in the petition, but pleads as a defense: First. That the consideration for the contract was the agreement by appellant to then and there have illicit intercourse with him, and that his promise was made upon no other consideration. * * *

In Beach on the Modern Law of Contracts, § 1553, it is said: "A contract made in consideration of future illicit sexual intercourse is void, and the woman cannot recover under such contract, although it has been performed on her part." In Parsons on Contracts, star page 66, the rule is thus stated: "But it would seem on general principles to be a good defense (to an action for breach of promise

to marry) that the promise was made on condition that the plaintiff would commit fornication with the defendant; for such a promise might be void as founded upon an illegal consideration." In Baldy v. Stratton, 11 Pa. St. 316, the court say: "A promise to marry on condition of illicit intercourse is illegal, and a consideration that will not support a promise. A promise to marry on an illegal consideration is virtually void." In the case of Judy v. Sterrett, 52 Ill. App. 265, it was held that "a promise of marriage in consideration of illicit sexual intercourse is void." In the case of Hanks v. Naglee, 54 Cal. 52, 35 Am. Rep. 67, it is said: "Upon well-settled principles the plaintiff should not have recovered upon a contract of this character (to marry), as, being a contract for illicit cohabitation, it is tainted with immorality. * * * It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of the female, and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage." * * *

Judgment affirmed.

MARKSBURY ET AL. v. TAYLOR ET AL.

1874. 10 Bush (Ky.) 519.

IN this case a petition was filed by the heirs at law of George R. Smith against the surviving husband and heirs at law of Mrs. Taylor to set aside deeds made in 1864 and 1865 by Smith to Mrs. Taylor.

COFER, J.—* * * The third ground relied upon for relief is that the only consideration for the deeds was the illicit intercourse between the grantor and the grantee.

It has been suggested already that there was a valid consideration for the deed of 1864; but as to the deed of 1865 there is no evidence of any lawful consideration except the recital in the deed, and this is overcome by the evidence offered by the appellants to rebut it.

As to the latter deed we are therefore brought face to face with the fact that it was executed in consideration of an adulterous intercourse between the parties, and are asked by the appellants to affirm a judgment ordering it to be canceled on that ground.

In entering upon the consideration of that question we are at once encountered by the maxim, *"In pari delicto potior est conditio defendentis, et possidentis."* The contract, if based on the alleged adulterous intercourse between Smith and Mrs. Taylor, is neverthe-

less completely executed, and her children are in possession and need not ask the aid of the court; and the general rule is, as expressed in the maxim just quoted, that where both parties are equally guilty the court will leave them exactly where it found them.

It is insisted, however, that there is a class of cases where transactions or agreements in contravention of public policy will be relieved against in equity for the reason that the public interest requires it to be done, and the court will serve the public through the individual, although he be a party to the wrong; but it is believed that in the cases where this has been done the decisions were either based upon statutes or have been subsequently disregarded as unsound.

The law, both in this country and in England, now undoubtedly is, in general, where parties are equally concerned in illegal agreements or transactions, whether such agreements or transactions be *mala prohibita* or *mala in se,* courts of equity, like courts of law, will not interpose to grant relief to either. (Story's Equity, § 298; Brookover v. Hurst, 1 Met. (Ky.) 668; Inhabitants of Worcester v. Eaton, 11 Mass. 377; Browning v. Morris, Cowper 792; Bibb v. Bibb, 17 B. Mon. (Ky.) 307.)

We are therefore constrained to hold that an executed contract based upon illicit sexual commerce cannot be set aside at the instances of the grantor or his heirs at law, who cannot occupy in court a better position than their ancester through whom they claim.

We have been referred to several cases supposed to sanction a different rule, but we do not so understand them; and if they do, they are opposed by a list of authorities so pointed and overwhelming that we feel compelled to decide in accordance with the authorities holding the views we have before expressed. * * *

Cause remanded with directions to dismiss the petition.

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§ 65 (F)—Affecting the Freedom or Security of Marriage.

WILLIAMS ET AL. v. COWDEN.

1850. 13 Mo. 211.

A, BY HIS will, devised to his son B and his daughter C, in equal moieties a tract of land, with the provision that "if his said daughter should marry or die" the land should belong exclusively to his said son.

BIRCH, J.— * * * Upon the general proposition, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience

and reverence, are deemed to be objects too important to society, to be weighed in the scale against individual or personal will. In this case, it need scarcely be more specifically intimated, that the clause in question, however well intended, virtually presented and held up a continued reward for that species of immorality to avert which the institution of marriage was so divinely ordained and has been so wisely upheld. * * *

Judge Story, in his admirable commentaries upon equity jurisprudence, after remarking upon the cases which even he cannot reconcile, states the general result of the modern English doctrine in these words: "Conditions, annexed to gifts, legacies and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy and the due economy and morality of domestic life, it will be held utterly void. * * *

SHACKELFORD AND WIFE v. HALL ET AL.

1857. 19 Ill. 212.

A DEVISED to his daughter a tract of land subject to the condition that she should not marry until she "attained the age of twenty-one years."

CATON, C. J.— * * * The testator may impose reasonable and prudent restraints upon the marriage of the objects of his bounty, by means of conditions precedent, or subsequent, or by limitations, while he may not, with one single exception, impose perpetual celibacy upon the objects of his bounty, by means of conditions subsequent or limitations. That exception is in the case of a husband in making bequests or legacies to his own wife. He may rightfully impose the condition of forfeiture upon her subsequent marriage. It would be out of place, on the present occasion, to enter into the reasons of this exception, more than to say, that it is out of regard to the family of the testator, rather than to any morbid sensibility or jealousy toward one who might come after him, which might be supposed to have prompted the condition. * * *

DUMEY v. SCHOEFFLER AND WIFE.

1857. 24 Mo. 170.

A WILL contained the following provisions: "I give and bequeath unto my wife, Sarah, the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them."

LEONARD, J.—* * * Our law having made provision for the support of the wife out of her husband's estate, which he is not allowed to control by his will, it seems but reasonable to allow him the privilege of disposing of the residue of his property as his judgment shall deem best for the interest of his family. The wife may reject the scheme he has provided for their support and government after his death, so far as her rights of property are concerned, if she prefer the dower allowed her by law. But after she has made her election to take under the will by omitting to renounce its provisions, she has no cause to complain that she is held to her own choice, and not allowed upon her subsequent marriage to enjoy *absolutely* the larger estate, that was given to her by her husband conditionally, under the expectation that if she kept the condition and remained unmarried she would devote herself and what she possessed to the well-being of the family of which she was the surviving head. This distinction, too, has a place in the habits and sentiments of our people; such dispositions of property are of very frequent occurrence, and are approved by the common judgment of the community. * * *

IN RE GROBE'S ESTATE.

1905. 127 Iowa 121, 102 N. W. 804.

MCCLAIN, J.—The finding of facts by the trial court was that there was a contract between Mrs. Aldinger, the claimant, and the deceased, whereby the latter agreed to pay to the former $200, if she would go to Chicago to see a woman whom he was desirous of marrying, and give her information concerning him, and that claimant went to Chicago in pursuance of this contract, and incurred certain expenses, all at the request of deceased. The court allowed a portion of the claim, which was for money advanced, but denied recovery for compensation on account of services rendered, on the ground that the contract was a marriage brokerage contract, and void as against public policy.

It is well settled that no recovery can be had under a contract for services to be rendered in promoting or bringing about a marriage. Advice and solicitation on the part of a third person with reference to entering into the important relation of marriage are presumed to be given from considerations affecting the interests of the parties themselves, and not for pecuniary reward. It is contrary to public policy to make such advice or solicitation the basis of an agreement to pay money. And the rule is equally applicable to advice or solicitation with reference to carrying out a marriage contract, as it is with reference to the formation of such contract. "The freedom of choice is essential to a happy marriage; and the voluntary selection by each spouse of the person who is to be his companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to the agreement of marriage to carry it into effect, if he has once been disposed to abandon it, as to endeavor to bring about such an agreement between parties who do not sustain any relation to each other." Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. 95.

It does not clearly appear in the present case whether the deceased had already a contract of marriage with the woman in Chicago, which he desired the claimant to assist him in bringing about, or whether he was seeking to induce her to enter into a contract of marriage with him. But it is wholly immaterial what was the prior relation between the parties. It is clearly shown that the services to be rendered by claimant under her agreement with deceased, and for which she desires compensation, were to give to the woman whom deceased wished to marry information concerning him which would tend to induce the woman to enter into such marriage relation; and no argument is necessary to demonstrate that this arrangement was a marriage brokerage contract, pure and simple—such as is deemed by the law to be against public policy, and therefore void. Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343; Fuller v. Dame, 18 Pick. (Mass.) 472, 481; Morrison v. Rogers, *supra;* 2 Pomeroy, Equity, § 932.

The judgment of the lower court is affirmed.

WALKER v. WALKER.

1870. 9 Wal. (U. S.) 743.

DAVIS, J.—* * * In the month of September, 1845, Doctor Walker, a citizen of Charlestown, Massachusetts, without cause, compelled his wife and two of their children to leave his house. Before this time he had treated his wife with great harshness and

cruelty, proceeding so far as to inflict personal violence on her. This conduct entitled the wife, by the laws of Massachusetts, to a decree of divorce from bed and board, and for a proper allowance of alimony; and with a view to obtain these, she applied to counsel to take legal proceedings against her husband. On learning this, Doctor Walker sought the advice of his friend, Uriel Crocker, and wished him to confer with a lawyer on the subject. This friendly service was performed by Mr. Crocker, and the conference resulted in recommending the husband to settle on his wife $50,000, and that articles of separation between them be executed. It was considered that the sum agreed upon was a suitable settlement under the circumstances, as the greater part of it had been obtained by the husband from the estate of the wife's father, and as he was, without this, a person of large fortune. The parties adopted the recommendation of Mr. Crocker and his conferee, and on that basis the articles of separation were drawn and executed. * * *

It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled. Compton v. Collinson, 2 Brown's C. C. 377; Worrall v. Jacob, 3 Merivale 266; Lee v. Thurlow, 2 B. & C. 546; Webster v. Webster, 1 Smale & Gef. 489; 23 English L. & E. 216; 4 De G., M. & G. 489; 17 Eng. L. & E. 278; Randle v. Gould, 8 El. & Bl. 457; Carson v. Murray, 3 Paige (N. Y.) 483; Nichols v. Palmer, 5 Day (Conn.) 47; Hutton v. Duey, 3 Barr. (Pa.) 100; Bettle v. Wilson, 14 Ohio 257; Chapman v. Gray, 8 Ga. 341; Reed v. Beazley, 1 Blackford (Ind.) 97; Wells v. Stout, 9 California 494; Dillinger's Appeal, 35 Pa. St. 357; Gaines v. Poor, 3 Met. (Ky.) 503; Hunt v. Hunt, by Lord Westbury in 5 L. T. R. 778.

It is true that different judges, in discussing the question, have struggled against maintaining the principle, but while doing so they have not felt themselves at liberty to disregard it, on account of the great weight of authority with which it was supported and have, therefore, uniformly adhered to it. It is unnecessary to consider whether the extent to which the doctrine has been carried meets our approbation, nor are we required to discuss the subject in any aspect which this case does not present. It is enough for the purposes of this suit to say that a covenant by the husband for the maintenance of the wife, contained in a deed of separation between

them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this is especially true if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than a court, before which she was entitled to carry her grievances, would have decreed to her as alimony. * * *

BLANK v. NOHL.

1892. 112 Mo. 159, 20 S. W. 477.

BLACK, J.— * * * Marriage is more than a mere civil contract. It is a matter of state concern; and, when the marital relation is once created, it cannot be dissolved by any agreement of the parties. It can be dissolved, and dissolved only, in the manner and for the causes allowed by law. Courts sitting in divorce cases are bound to protect the public interests as well as the rights of the parties themselves; and hence it is that, before a party is entitled to a divorce, it must be made to appear by proof that he or she is the innocent and injured party; and this, too, though there is a default on the part of the other party. For like reasons, the law is well settled that an agreement having for its object and consideration the granting of a divorce is illegal and void. Says Bishop: "But the law does not favor divorce, and permits it only in approved cases, and on sentence from duly-established authority. Therefore any agreement for divorce, or any collateral bargain promotive of it, is unlawful and void." 2 Bish. Mar. & Div., § 696 (Ed. 1881). The defendant in a divorce suit is not bound to make a defense, and mutual assistance in proving the actual facts does not amount to collusion. Stew. Mar. & Div., §§ 302, 303. But a bargain that there shall be no defense is collusion, and any promise founded on such an undertaking cannot be enforced. 2 Bisch. Mar. & Div., § 239 (6th ed.). The case of Barnes v. Barnes, 1 Prob. & Div. 505, furnishes an illustration of what are and what are not collusive contracts. It is there said, in substance, that the mere fact that the husband gave the wife money for her support, both before and after he instituted the divorce suit, did not prove collusion; but furnishing the support in consideration that the wife would keep quiet, so that he could get a decree cheaper than he otherwise would get it, was collusion. Says Bishop: "It makes no difference how just the cause may be, if the parties collude in the management of the case before the court, this is collusion. It is also collusion where material facts

are suppressed, though they would not have changed the result." 2 Bish. Mar. & Div., § 28 (6th ed.). The authorities are numerous to the effect that any agreement that the defendant in a divorce suit will not make a defense, or having for its object the dissolution of a marriage contract, or designed to promote and facilitate a divorce, is void, because opposed to the policy of the law; and any promise founded on such an agreement is also void, and should not be enforced. Sayles v. Sayles, 21 N. H. 319; Cross v. Cross, 58 N. H. 373; Viser v. Bertrand, 14 Ark. 267; Stoutenburg v. Lybrand, 13 Ohio St. 228; Kilborn v. Field, 78 Pa. St. 194; Adams v. Adams, 25 Minn. 72; Muckenburg v. Holler, 29 Ind. 139; Phillips v. Thorp, 10 Ore. 494. The defendant in the divorce suit made a proposition to the plaintiff to the effect that if she would let judgment go in his favor he would settle upon her $75 per month. Thereupon the pleadings were amended, and the witnesses discharged, and in four days thereafter the case was submitted on the letters, and the defendant obtained a divorce decree. On the next day the contract now in question was executed. On this evidence the conclusion would be irresistible that this written contract simply voiced a previous arrangement. On such a state of facts, there can be no doubt but the contract should be held to be illegal and void. * * *

MILLER v. MILLER.

1889. 78 Iowa 177, 42 N. W. 641.

THIS was an action by a wife against her husband to recover on a contract between them, whereby it was agreed to drop all matters of dispute, to refrain from scolding, fault finding, and anger, and live together as husband and wife; that the wife should keep her home in comfortable condition; and that the husband should provide all the necessary expenses of the family, and pay the wife in addition a certain sum per month.

Demurrer sustained. Appeal.

GRANGER, J.— * * * Whatever may have induced the making of the contract, one thing is certain,—the ground of recovery from time to time is a faithful observance of the contract. If payment of the amounts is enforced, this observance must be pleaded, and, if denied, it must become a matter of judicial inquiry. Now, looking to the contract, we find that the plaintiff has agreed to do just what is demanded by her marital relations and is essential to domestic felicity. If she does this, under the letter of her contract, she may recover; if she does not, she cannot recover. * * *

It is of the genius of our laws, as well as of our civilization, that

matters pertaining so directly and exclusively to the home, and its value as such, and which are so generally susceptible of regulation and control by those influences which surround it, are not to become matters of public concern or inquiry. This thought has vindication throughout our system of jurisprudence. The marital obligation of husband and wife in the interest of homes, both happy and useful, have a higher and stronger inducement than mere money consideration, and they are generally of a character that the judgments or processes of the courts cannot materially aid. We are not referred to, nor do we find, a case wherein a recovery has been justified on a contract of this character. It is to be kept in mind that public policy is not against the payment of money, if it is done voluntarily; but the evil which the law anticipates arises from the enforcement of such a contract, which, if legal, should of course be enforceable. * * * It is said in argument that in this case the husband had been guilty of such conduct as to justify the wife in leaving him, and would have been entitled to a separate support, and it was because of this contract that she consented to live with defendant, and that the amount was settled upon the wife in pursuance of the agreement. Stripped of the conditions upon which payment is to be made, such a contract might not be questioned. The enforcement of this contract as to payments involves an inquiry into just the facts which we have been urging as against public policy. The payments are to be made "so long as Mrs. Miller shall faithfully observe the terms and conditions of their contract." If, then, she seeks to compel payment, she must do so by averring her compliance in general terms, and the husband may answer, putting in issue the facts, and then follows the inquiry if at some time she did not scold or find fault. Was she not at some time angry? Has she kept the family in a comfortable condition? * * * It needs no argument to show that such inquiries in public would strike at the very foundations of domestic life and happiness. Public policy dictates that the door of such inquiries shall be closed; that parties shall not contract in such a manner as to make such inquiries essential to their enforcement. What element could be introduced into a family that would tend more directly to breed discord than this contract? A failure to pay from any cause not her fault renders the husband liable to judgment, and this from month to month, or from year to year. No misfortune frees him from this obligation save that of the loss or misconduct of his wife. In the very nature of things, a demand for such a payment would engender ill feelings and provoke complaints as to conduct that would otherwise pass unnoticed, or at least without attention. An effort at compulsory payment would almost certainly bring before the courts allegations of misconduct, based upon incidents of little moment, to be magnified or belittled in the interest of success in court.

Mr. Bishop, in his work on Contracts, speaking of the enforce-

ment of contracts for services by the wife to the husband, treats, in part only, what might be expected on the trial of issues of fact in the case at bar, when he says: "If the wife spends an afternoon in visiting her mother, instead of making jellies, shall the husband bring her into court, to determine the abatement to be made from the sum he had promised her for work in keeping his boarding-house? Shall there be a lawsuit to settle the allowance for tending the baby, which is partly his and partly hers? If her washing is sent to a laundress, and her clothes had been soiled in part in doing his work, and in part in doing her own, and in part in tending the baby of both, shall the judge of a court be employed in instructing the jury how to adjust the account between them?" Section 948. When we think of the thousand occurrences of life to provoke an unpleasant word, to stimulate anger, or a word of fault-finding, and think of the circumstances in domestic life from which they may arise, we can best understand the character of the inquiries likely to arise in the enforcement of the contract in the case at bar. That which should be a sealed book of family history must be opened for public inspection and inquiry. The law, except in cases of necessity, will not justify it.

The cases to which we are referred by appellant are unlike this as to their facts. The case of Adams v. Adams, 91 N. Y. 381, is where a suit for divorce was pending, and the suit was settled and dismissed by the plaintiff; she condoning his offense of adultery, and returning to live with him, he giving his note in settlement. The note was held valid. We have not held in this case that, if the plaintiff was seeking to recover on an absolute promise to pay because of any consideration, the contract would not be good, nor do we hold that it would. We only say now that, with the conditions of this contract as to payments, its enforcement is against public policy.

* * *

Judgment affirmed.

BARBOUR v. BARBOUR.

1892. 49 N. J. Eq. 429, 24 Atl. 227.

BILL for specific performance. A husband against whom his wife had filed a petition for divorce upon the ground of adultery asking for alimony and counsel fee, entered into an agreement with his wife, in and by which he promised, that if she would dismiss her suit and return to him, and live with him as his wife, he would execute and deliver to her a deed for the house and lot in and upon which they had been living and she accepted his offer, dismissed her suit and returned to his home in good faith.

BIRD, V. C.— * * * It is not contrary to public policy, as understood in this state, notwithstanding it may be so regarded in others, to maintain the integrity of such contracts. In Merrill v. Peaslee, 146 Mass. 460, 16 N. E. 271, it was held by a divided court that such contract ought not to be enforced. To the same effect is the case of Copeland v. Boaz, 9 Baxt. (Tenn.) 223. But I take it for granted from what has been said by the courts of this state respecting agreements between husband and wife, looking to their separation, that agreements providing for the peaceable continuance of their marital relations would be most certainly sustained. In the case of Emery v. Neighbor, 7 N. J. Law 142, the court held that covenants which purported to be tripartite, (the husband being one party, the wife another, and a proposed trustee a third,) in the execution of which the third party did not join, were inoperative and void, but said: "Where a husband, by articles, places money in the hands of trustees for the sole and separate use of the wife, and to be subject to her sole order and disposition, although the articles of agreement may be wholly inoperative as an article of agreement, in consequence of the trustees never signing the same, yet if the wife, upon the faith of this agreement, lived separate and apart from her husband, and at her death makes a testamentary disposition of this money, her administrator may recover it from the said trustee, and her husband will not be entitled to it." In Calame v. Calame, 25 N. J. Eq. 548, after a careful review of the authorities, the court of errors and appeals decided: "An agreement in writing, made by a husband who had deserted his wife, to give her certain lands and money in lieu of all her claim upon him for maintenance, the offer having been accepted by the wife, will, on a divorce being granted, be enforced in equity." In Adams v. Adams, 91 N. Y. 381, it was held: "Plaintiff, having commenced an action against defendant, her husband, for divorce *a vinculo,* and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for $1,000, agreed to and did discontinue the action, without costs. In an action upon the note, held, that it was given for a good consideration and was valid; that the transaction could not be regarded as against public policy." The court further observes: "We are unable to perceive on what ground the arrangement can be regarded as against public policy. It tends to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." To the same effect are Phillips v. Meyers,

82 Ill. 67; Reamey v. Bayley (Pa.), 11 Atl. 438; Hart v. Hart, 18 L. R. Ch. Div. 670. * * *

Prayer of complainant granted.

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§ 65 (G)—Restraint of Trade.

RICHARDS v. AMERICAN DESK & SEATING CO.

1894. 87 Wis. 503, 58 N. W. 787.

DEFENDANT agreed to purchase $200,000 worth of goods from plaintiff, who agreed not to sell like articles in some 30 states and territories of the United States. In an action for goods sold and delivered, defendant set up this contract, and alleged breaches of it as a counterclaim. There was nothing to show the ordinary amount of manufacture and sale by either party, or that defendant had established a trade in more than 1 state out of the 30.

Demurrer to counterclaim sustained. Appeal.

PINNEY, J.— * * * It will be seen from the statement of the case that the restraint against the plaintiff's assignor, alleged to have been violated, was total in all the states and territories named in it, except Wisconsin and Michigan, where it extended to parts only of those states, but it was limited in respect to the time it was to continue. That any agreement in restraint of trade of one of the parties to a contract is void, as being against public policy, unless founded upon a valuable consideration, and limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case, is well settled, for the reason that such contracts tend to deprive the public of the services of parties in the employments and capacities in which they are most useful, and that they tend to expose the public to the evils of monopoly. Kellogg v. Larkin, 3 Pin. (Wis.) 123; Laubenheimer v. Mann, 17 Wis. 561; Alger v. Thacher, 19 Pick. (Mass.) 51; Bishop v. Palmer, 146 Mass. 469, 473, 16 N. E. 299; Navigation Co. v. Winsor, 20 Wal. (U. S.) 66, 67; Gibbs v. Gas Co., 130 U. S. 396; Lange v. Werke, 2 Ohio St. 519; Telegraph Co. v. Crane, 160 Mass. 50, 35 N. E. 98. These cases show, and many others might be cited to same effect, that it is essential, in order not to be unreasonable, that the restraint imposed must not be larger than is plainly required for the protection of the party with whom the contract is made, and whether it is reasonable in a given case is a question, not of fact, but of law for the court. Poll. Cont. 366-368; Washburn v. Dosch, 68 Wis. 440, 32 N. W. 551. The test as to whether the restraint is reasonable or not is well expressed

in the often-cited case of Horner v. Graves, 7 Bing. 735, 743, where it is said: "The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable." It is said, in substance, in many cases, that all restraints are presumed to be bad, but, if the circumstances are set forth, that presumption may be excluded, and the court is to judge of these circumstances whether the contract be valid or not. Taylor v. Blanchard, 13 Allen (Mass.) 373; Callahan v. Donnolly, 13 Am. Rep. 172, and note; Mallan v. May, 11 Mees. & W. 853; Lange v. Werke, 2 Ohio St. 519; Kellogg v. Larkin, 3 Pin. (Wis.) 123; Machine Works v. Perry, 71 Wis. 495, 499, 501, 38 N. W. 82. It is held, in substance, in these cases, that the pleading will be bad on demurrer if it does not appear from the contract or averments of extrinsic facts that the restraint was reasonable. This is in accordance with the great weight of authority, and seems to be the necessary result of the rule as to the validity of such restraint. * * *

The counterclaims and second contract, made an exhibit thereto, are exceedingly meager, and wholly insufficient to show that the agreement of restraint insisted on by the defendant was reasonably necessary for the protection of its interests under the contract. While it appears, by implication, that the respective parties may have agencies in the territory set apart to each for the sale of the line of goods and wares mentioned in the contract, there is nothing to show the amount of annual output of these goods and wares by the plaintiff's assignor, or of the ordinary amount of manufacture and sale by either party, or that the defendant had established or carried on any trade in more than one state out of the thirty states and territories to which the restraint it seeks to enforce extends, and in respect to which it charges violations of this restraint by the plaintiff's assignor. The counterclaims wholly fail to show that the defendant's interest for less than four years in the sale and disposition of $200,000 in value of the goods and wares mentioned, even upon the most liberal view of the subject, and under the existing state of trade and competition, would justify the very extensive restraint relied on. It follows from these views that, upon the face of the pleadings, it is not made to appear that the contract was a reasonable and valid one, and therefore the portions of the order appealed from are erroneous. The parts of the order of the circuit court appealed from are reversed, and the cause is remanded, with directions to sustain the plaintiff's said demurrers to the counterclaims.

ANCHOR ELECTRIC CO. v. HAWKES.

1898. 177 Mass. 101, 50 N. E. 509.

BILL for injunction based upon "an agreement by officers of three separate corporations engaged in manufacturing and dealing in electric goods, who became officers of a new corporation, which purchased the interest and good will of the others, not to engage in a like business or compete in any manner for a period of five years, unless upon withdrawing from such corporation if put at a disadvantage in reference to salary."

Defendant violated the agreement. Decree for plaintiff, and, at defendant's request, the case was reported to the full bench.

KNOWLTON, J.— * * * The only question which we need to discuss in this case is whether the stipulation on which the bill is founded is void as against public policy. * * *

From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable on two grounds: They tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade; the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business, and the increased freedom of communication which have come in recent years, have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation if he contracts to give up his old one makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field. The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit as well as for the benefit of the purchaser that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the good will of a business is well established. But the particular provisions which are reasonably necessary for the protection of the good will of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limi-

tation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the house of lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the kingdom should be necessary to the protection of the good will of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the restriction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the house of lords in the case of Nordenfelt v. Maxim, etc., Co. (1894) App. Cas. 535, affirming the unanimous judgment of the court of appeals in (1893) 1 Ch. 630, it is now settled in England that a covenant, unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid, if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts in that case. The earlier English authorities are reviewed at length in the opinions, and it is unnecessary to refer to them here. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction. Manufacturing Co. v. Garst, 18 R. I. 484, 28 Atl. 973; Fowle v. Park, 131 U. S. 88-97; Navigation Co. v. Winsor, 20 Wall. (U. S.) 64; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419; Whitney v. Slayton, 40 Me. 224; Association v. Starkey, 84 Mich. 76, 47 N. W. 604. In this commonwealth the general doctrine of the cases seems to be that, in connection with the sale of the good will of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. Pierce v. Fuller, 8 Mass. 223; Perkins v. Lyman, 9 Mass. 522; Stearns v. Barrett, 1 Pick. (Mass.) 443; Palmer v. Stebbins, 3 Pick. (Mass.) 188; Pierce v. Woodward, 6 Pick. (Mass.) 206; Angier v. Webber, 14 Allen (Mass.) 211; Dean v. Emerson, 102 Mass. 480; Machine Co. v. Morse, 103 Mass. 73; Boutelle v. Smith, 116 Mass. 111; Ropes v. Upton, 125 Mass. 258; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634. In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold.

In Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, relied on by the defendant, the covenant was unrestricted as to space, and was made in connection with the sale of the property and good will of a local business, not peculiar in its nature, for the protection of which so extensive a covenant was held to be unnecessary. The case of Telegraph Co. v. Crane, 160 Mass. 50, 35 N. E. 98, is not inconsistent with the contention of the plaintiff. It is said in the opinion that the "plaintiff did not buy the good will of a mercantile business, and the defendant, Crane, had no customers for fire alarm and police telegraph machines and apparatus." A ground of the decision stated by a majority of the court is as follows: "The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property bought, even if that should be adopted as the test, upon which we express no opinion." Inasmuch as the stipulation in the present case is only to do no business for five years that shall interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear, under the authorities in Massachusetts, that the stipulation goes no farther than is reasonably necessary to protect the good will of the business sold by the defendant's corporation, and that it should, therefore, be held valid. * * *

Decree for plaintiff.

HURSEN v. GAVIN.

1896. 162 Ill. 377, 44 N. E. 735.

MAGRUDER, J.—When appellant sold to appellee his undivided one-half interest in the livery and undertaking business at 976 and 978 West Lake street and 1391 West Madison street in the city of Chicago for $5,500, he executed a bill of sale in which was inserted the following provision: "It is expressly agreed that Patrick Hursen shall not engage in the livery and undertaking business in the city of Chicago for a period of five years from this date," (April 20, 1892). It is conceded, that the contract was entered into, and the only question is whether it was valid and whether it has been violated by the appellant.

It is charged, that the agreement of appellant not to engage in the livery and undertaking business in the city of Chicago for a period of five years is invalid as being in restraint of trade. Undoubtedly contracts in total restraint of trade are void, and upon two grounds, first, because of the injury to the public of being deprived of the industry of the party who is restrained, and, second, because of the injury to the party himself by being deprived of the opportunity to pursue his occupation and thereby support his family. A contract in

restraint of trade is thus total and general, when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or state. Such a general contract in restraint of trade necessarily works an injury to the public at large and to the party himself in the respects indicated, and is, therefore, against public policy.

But a contract, which is only in partial restraint of trade, is valid, provided it is reasonable and has a consideration to support it. (5 Lawson on Rights, Remedies and Practice, § 2403; 3 Am. & Eng. Ency. of Law, p. 882, and cases in notes; Oregon Steam Navigation Co. v. Winsor, 20 Wall. (U. S.) 64.) The restraint is reasonable, when it is such only as to afford a fair protection to the interests of the party, in whose favor it is imposed. If the restraint goes beyond such fair protection, it is oppressive to the other party and injurious to the interests of the public, and, consequently, void upon the ground of public policy. A contract in restraint of trade, to be valid, must show that the restraint imposed is partial, reasonable and founded upon a consideration capable of enforcing the agreement. "Courts will not enquire whether the consideration was adequate or equal in value to that which the party loses by the restraint. The contract must be construed by the court, and its reasonable character and the consideration for it determined." (Linn v. Sigsbee, 67 Ill. 75.) Where the restriction embraces too large a territory, it will be unreasonable and void as being wider than is necessary for the protection of the party in whose favor it is imposed, but where the restriction limits the exercise of the occupation within reasonable bounds, it is valid as being no larger than is necessary to protect the covenantee. (5 Lawson on Rights, Remedies and Practice, §§ 2403-2405; Lin v. Sigsbee, *supra.*)

In Linn v. Sigsbee, *supra,* a practicing physician sold his house and lot for $2,000 and included in the sale his practice and obligated himself to the purchaser, who was also a practicing physician, not to establish or attempt to establish a medical practice within a certain township, nor within six miles of his residence; and we held, that the limitation was reasonable, that there were good reasons which induced the contract, and that there was a legal consideration.

In Pelz v. Eichele, 62 Mo. 171, a contract not to engage in the manufacture of matches in the city of St. Louis "or at any other place" was held to be divisible, and valid as to that portion which restrained the manufacture of the matches within the city of St. Louis. To the same effect, substantially, is Gill v. Ferris, 82 Mo. 156.

In Washburne v. Dorsch, 68 Wis. 436, it was held that an agreement not to engage in the dry goods and grocery trade in a certain town for a period of five years, leaving the party at liberty to engage in any other business in that town, was valid as only a partial or limited restraint upon trade.

Where one engaged in business sells his stock or his business and good will with a limitation upon the restraint as to time, but none as to territory, the restriction is void, and a contract preventing one from carrying on his calling anywhere is unreasonable. (Wiley v. Baumgardner, 97 Ind. 66; Johnson v. Gwinn, 100 *id.* 466.)

In Mallan v. May, 11 M. & W. 653, an agreement not to carry on the practice of surgeon dentistry in the city of London was valid, although it was claimed by counsel, that the agreement was an undue, unreasonable and unlawful restriction of trade, because London contained a population of 1,500,000. (See, also, Green v. Price, 13 M. & W. 695; Price v. Green, 16 *id.* 346.)

In Dean v. Emerson, 102 Mass. 480, A and B entered into an indenture, in which B covenanted not to be interested in a certain business within a certain county, and also convenanted not to be interested in the same business for five years within the United States, and it was held that B was liable for a breach of the first covenant, although the second might be void as being in restraint of trade.

Applying these authorities and the principles therein announced to the case at bar, we are of the opinion that the contract between appellant and appellee was valid. It was only a partial restraint of trade. It was limited in time to the period of five years, and in space to the city of Chicago. One element of the value of the business transferred by appellant to appellee was the probability, that the customers of the former would continue to trade with the latter, and this probability was increased and the value of the purchase enhanced by the agreement of appellant not to engage in the same business in Chicago for five years. Such an agreement was, in part, an inducement to appellee to make the purchase, and was based upon a sufficient consideration. Appellant was at liberty to engage in any other business, or in the same business in any other place than Chicago. There was, therefore, only a limited restraint upon him as a tradesman, and not upon trade generally. Where one person is restrained from doing a particular business in a particular place, competition is left open to all others, and there is no injury to the public. The person restrained, in such case, merely yields to another the use of what he has disposed of to that other for value. The limitation here did not go beyond what was necessary for the protection of appellee in the prosecution of the business purchased by him, and was, therefore, reasonable.

That the appellant opened an undertaking establishment at 1057 West Lake street is clearly proven by the evidence. This was a violation of the agreement. We think that the decree of the circuit court was proper. Accordingly, the judgment of the appellate court is affirmed

Judgment affirmed.

OREGON STEAM NAV. CO. v. WINSOR.

1874. 20 Wal. (U. S.) 64.

BRADLEY, J.— * * * It is a well settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. Chit. Cont. 576, 8th Am. ed. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. *Id.;* Tindal, Ch. J., in Horner v. Graves, 7 Bing. 743. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. 2 Wms. Saund. 156, note 1. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.

The application of the rule is more difficult than a clear understanding of it. In this country especially, where state lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular state is or is not within the rule. It has generally been held to be so on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation. Taylor v. Blanchard, 13 Allen (Mass.) 375; Dunlop v. Gregory, 10 N. Y. 241.

But this mode of applying the rule must be received with some caution. This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy.

One is, the injury to the public being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.

In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.

To apply these principles to the case before us: the California Steam Navigation Company, being engaged in the business of transportation on the rivers, bays and waters of California, was willing to sell one of their steamers to the Oregon Steam Navigation Company, which was engaged in a similar business on the Columbia river and its tributaries, provided the latter company would agree that the steamer should not be used in the California waters for the period of ten years from the first day of May, 1864. This stipulation was necessary to protect the former company from interference with its

own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another state. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast. * * *

THE SUPERIOR COAL CO. v. LUMBER CO.

1908. 236 Ill. 83, 86 N. E. 180.

HAND, J.—This was an action of assumpsit commenced by the appellee in the circuit of Macoupin county, against the appellant, to recover the purchase price of certain coal sold and delivered by the appellee to the appellant. The declaration contained the common counts, to which appellant filed three special pleas, which averred, in substance, that it was engaged in business at Benld, in said county, which business consisted of buying coal at wholesale and selling the same at retail; that appellee was engaged in mining coal and selling the same at wholesale; that the coal the purchase price of which was the subject matter of the suit was purchased by the appellant under a contract with the appellee, whereby it was agreed that if the appellant would buy coal of the appellee at wholesale and retail the same at Benld, the appellee would not sell coal at wholesale to any other dealer in coal at said place, etc. A demurrer was sustained to said special pleas, and the appellant having elected to stand by its pleas, a judgment was rendered against it for the sum of $1,343.32, which judgment has been affirmed by the appellate court for the Third district, and a further appeal has been prosecuted to this court.

The contention is made in this court that the judgments of the appellate and circuit courts should be reversed on the ground that said contract was in restraint of trade and contrary to public policy, and that the purchase price of coal delivered under said contract could not be recovered in consequence of the invalidity of said contract. We do not agree with such contention. The contract was clearly entered into by the parties for their mutual benefit and with a view to facilitate trade and increase their business, and not with a view to restrain trade or to create a monopoly in the sale of coal at the town of Benld, and the fact that the effect of the contract

may have been to incidentally restrain competition in the sale of coal at said town did not make the contract illegal and void.

In Southern Fire Brick and Clay Co. v. Garden City Sand Co., 223 Ill. 616, the validity of a contract whereby the owner of a bed of fire clay agreed with certain experienced fire clay miners and corporations to erect a plant to be operated by said fire clay miners, the product of which was to be taken by said corporations at a fixed price, the owner agreeing not to operate a fire clay plant on any other land owned or controlled by him and the miners agreeing not to sell fire clay to any other parties than the said corporations and said corporations agreeing not to buy any fire clay except that produced at said plant, was under consideration, and it was held that, the main purpose and chief object of the parties to the contract being to foster trade and increase their business, the contract was not in restraint of trade and void, even though it might incidentally tend to restrain competition in the sale of fire clay. And in Brown v. Rounsavell, 78 Ill. 589, it was held that a contract to furnish for sale a certain make of sewing machines, which provided that the purchaser should engage in selling said machine and no other and to buy the same of the seller and no other, was not in restraint of trade and void.

Under the authority of these cases, and many others which have been decided by this court, the contract was not void, and it was not contrary to public policy to require the appellant to pay for the coal which it had purchased of appellee. The courts will not declare a contract void on the ground of public policy unless it clearly appears, as it does not in this case, that the contract is in violation of the public policy of the state. Leeds v. Townsend, 228 Ill. 451.

Finding no reversible error in this record the judgment of the appellate court will be affirmed.

Judgment affirmed.

LANZIT v. J. W. SEFTON MFG. CO.

1900. 184 Ill. 326, 56 N. E. 393.

BILL for injunction based on a contract whereby the seller of a paper novelty manufacturing business, a resident of Illinois agreed not to engage in such business in any capacity or furnish information thereof to anyone within the state of Illinois and Indiana for a period of ten years.

CARTER, J.— * * * It is too well settled to require discussion, that contracts in general restraint of trade are void as being against public policy. But contracts only in partial restraint of trade are valid and enforceable, if reasonable and supported by a consideration good in law. (Linn v. Sigsbee, 67 Ill. 75; Hursen v. Gavin,

162 *id.* 377, and cases there cited.) In Hursen v. Gavin, *supra,* we said (p. 380): "A contract in restraint of trade is thus total and general when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or state. Such a general contract in restraint of trade necessarily works an injury to the public at large and to the party himself in the respects indicated, and is therefore against public policy." See also Harding v. American Glucose Co., 182 Ill. 551; Wright v. Ryder, 36 Cal. 342.

It is said, however, by appellee, that what was said in the Hursen case was not necessary to the decision, and should not be regarded as authority in a case where the question is directly involved. It is also argued that the strictness of the rule laid down in the early cases has been greatly relaxed because of the different methods and increased facilities of communication and of transacting business, enabling the merchant or manufacturer to extend his trade over greater areas of territory than formerly was possible. Many cases are cited, among them Gibbs v. Baltimore Gas Co., 130 U. S. 409; Tode v. Gross, 127 N. Y. 485; Diamond Match Co. v. Roeber, 106 *id.* 477; Hodge v. Sloan, 107 *id.* 248; Leslie v. Lorillard, 110 *id.* 534, and Cowan v. Fairbrother, 32 L. R. A. 829. But all of these cases fully recognize the rule that the contract must be reasonable under all the circumstances of the case and not in general restraint of trade, and that whether it is so or not is a question to be determined by the court. Thus, in Oregon Steam Navigation Co. v. Winsor, 20 Wall. (U. S.) 64, while the contract there involved was by a divided court held valid, it was said in the opinion of the court that it has generally been held that a contract not to exercise a trade in a particular state is invalid under the rule, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation, but that in this country such a mode of applying the rule should be received with caution. And it was there, and also in Gibbs v. Baltimore Gas Co., 130 U. S. 409, further said: "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy."

The question is here presented whether said contract between appellant and appellee is or not reasonable and consistent with the public policy of the state. The record shows that appellant was, at the time of the making of the contract, engaged in said business in this state, and that after his term of employment by appellee ended he became employed by the Rentz company, engaged in this state, in part in the same business. The effect of the contract, if enforced as decreed below, would be to deprive the public—the people of the whole state—of the industry and skill of appellant in the particular trade or business in which he may be most skillful and useful, and compel him to engage in some other business or move to another state in order to support himself and family—in other words, to expatriate himself so far as his citizenship of this state extends and go beyond our jurisdiction. Whether or not, under certain facts and circumstances, a valid contract might not be entered into not to engage in a specified business within the state it is not necessary here to determine. As said above "cases must be judged by the circumstances." But we are of the opinion that a contract of the character and tending to produce the effect of the one under consideration is, under all of the circumstances shown, unreasonable and against the public policy of this state. (Allbright v. Teas, 37 N. J. Eq. 171; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560; Berlin Machine Works v. Perry, 71 Wis. 495; Holmes v. Martin, 10 Ga. 503; Lange v. Werk, 2 Ohio St. 519; Keeler v. Taylor, 53 Pa. St. 467; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.) For the period of ten years the restraint is total, when considered with reference to the limits of the state and so far as our laws and the jurisdiction of our courts extend. Besides, business and trade in this country are not usually affected by state lines, and there is nothing in this case to make it appear that the boundaries of this state or of the state of Indiana, or of both of them combined, are the reasonable boundaries of the territory covered, or intended to be covered, by the business or trade mentioned in the contract and necessary for the protection of appellee in its purchase from and contract with appellant. In the Hursen case we said: "Where the restriction embraces too large a territory it will be unreasonable and void, as being wider than is necessary for the protection of the party in whose favor it is imposed." True, cases may arise,—have arisen,—where it would appear that even a greater extent of territory than a single state would not be wider than necessary for the protection of the covenantee from the competition intended to be guarded against. But this is not the only test of the validity of the contract. The interest and welfare of the public are of paramount importance. If a contract is in restraint of trade throughout an entire state it may be void as against public policy, although it may appear not to be unreasonable when considered merely with reference to the extent of the business of the covenantee and the protection intended to be

secured to him. If such were not the rule, then the mere magnitude of the business and trade involved in the contract would determine its validity, overriding all questions affecting the public welfare.

The decree enjoining appellant from engaging in said business in the states of Illinois and Indiana is erroneous and should have been reversed by the appellate court. * * *

Reversed and remanded.

GRAND RAPIDS WOOD FINISHING CO. v. HATT.

1908. 152 Mich. 132, 115 N. W. 714.

BLAIR, J.— * * * The principal value, in many instances, of a business of manufacturing an article whose component parts are unknown, inheres in the secret formula or process for manufacturing it, and it is clear that, unless the owner of such secret process is able to make a valid contract not to reveal the formula, the power to sell such property will be practically denied him. The secret process enhances, and is a part of the value of the articles manufactured and of the business carried on under it, and is as much a lawful subject of disposal as property as the articles themselves manufactured. A contract to sell such process is therefore valid and binding. Thum Co. v. Tloczinski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. 469; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. 475; Westervelt v. Paper Co., 154 Ind. 673, 57 N. E. 552; Morse-Twist Drill Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513. * * *

JOHN D. PARK & SONS CO. v. HARTMAN.

1907. 153 Fed. 24.

LURTON, J.— * * * The most satisfactory ground upon which covenants restraining the use to be made of a trade secret may be said to not contravene the common-law rules against monopoly and restraints lies in the peculiar character of the property right which is concerned. So long as the owner of such a secret can preserve its secrecy he has necessarily a monoply in its use, and there is no illegal restraint because he refuses to make it public. Neither is the public interest affected whether the process or formula is used by A or B, or by both, for there can be no restraint of trade in respect of a method or formula which is known only to the discoverer and those to whom he chooses to communicate it under restrictions. Having no right to compel a publication, the public lose no right by

respecting a restricted disclosure, for no freedom of traffic has been stifled. The language of Justice Holmes in Board of Trade v. Christie, 198 U. S. 236, in respect of contracts limiting the right of those who receive the market quotations to a special use, is equally applicable to trade secrets in general. The learned justice said:

"But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

In Ammunition Co. v. Nordenfeldt, L. R. 1 Ch. Div. 630, 1894, Lord Justice Bowen said that the sale of a trade secret was not within the mischief of restraint of trade, because, "unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture" * * * But it does not follow that because a secret process or formula for a medicine or beverage will be protected against betrayal by employes or those to whom it has been communicated in confidence under a contract for a restricted use that a system of contracts for the control of all sales and subsales of the device, medicine, or beverage when once made will be outside of the rules in restraint of trade simply because the produce of such secret process or formula. We have here to deal not with contracts which relate to the secret formula itself, or the right to use a trade-name or dress, as in Fowle v. Park, 131 U. S. 88, but with the preparation when made by the owners of the process. The preparation when ready for the market and the formula are two separate and distinct things and may have distinct ownerships. Contracts in respect of a restricted use of the formula are not within the rule against restraint because of the character of the property right in such a secret. There can be no unrestricted use, before discovery by fair means, to which the owner does not consent, and then only at the expense of the destruction of its commercial value as a secret; but this is not the case with contracts which affect only traffic in the manufactured product of the secret formula. Freedom of traffic in that is consistent with its value and does not involve exposure of the formula.

Neither is there any such analogy between an article made under a patent and an article made under a secret formula as to require like exemptions from the rules which relate to articles made under neither. It is well at this point to notice that the exemption from the rule against restraint has never been extended to contracts in respect of articles made under a patent which have once passed beyond the domain of the patent by an original sale without restriction. The only reason which has ever been given for holding that a contract restricting the field of using, selling, or making of an article made under a patent is that the patent statute has granted an exclusive monopoly which cannot be cut down by the rule against restraint for that would be to grant a monopoly by law and then pro-

ceed to take it away by law. But if the owner of a secret process or a private formula does not or cannot bring himself under the protection of the patent statute by securing a patent upon his discovery, he cannot claim the advantage of the statute. The patent law, in consideration of a full and complete publication of the discovery or invention of the patentee, has granted to him a monopoly of his invention, including the making, selling, and using of devices embodying it, for a limited term of years. At the end of that time the disclosure made at the time he applied for his patent will enable the public to enjoy his discovery, and thus find compensation for the exclusive right temporarily conceded to the inventor. No statute grants any such monopoly to anyone who does not elect to avail himself of the benefits of the patent or copyright law. A trade secret or medical formula protects its owner only against those who acquire it under a confidential obligation to guard against disclosure, and, as we have already seen, one is free not only to use the process or formula if discovered by skill and investigation without breach of trust, but to make and sell the thing or preparation as made by the process or formula of the original discoverer, if that be the truth. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. 442. To say that the owner of this secret need not make the medicine, nor sell it when made, unless it suits his convenience, is true. But the same thing may be said of the man who grows potatoes. He need not grow them, and need not sell them when grown. But, if something be conceded in favor of an article which no one can produce, except the owner of the formula over one which anyone can produce, what shall it be? There is no statute creating a lawful monopoly such as seems to take articles made thereunder without the rule against illegal restraint. Neither will the commercial value of the manufactured product vanish if subjected to the principles which apply to things not so made. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself apply to the product of the formula. * * *

VULCAN POWDER CO. v. HERCULES POWDER CO. ET AL.

1892. 96 Cal. 510, 31 Pac. 581.

McFARLAND, J.— * * * Appellant contends that the principle that contracts in restraint of trade are void does not apply to the contract here sued on, because it deals with certain patent rights. The facts on which this point is based are these: It appears from the contract that three of the contracting parties were the owners of certain letters patent for invention of methods or processes for making dynamite. The other two parties, viz., the plaintiff herein and Vig-

orit Powder Company, did not have any such patent. There is a good deal of recitation in the contract about these patents, and mention is made of an "interchange of rights" under them. It is recited that the parties are desirous of being released from all claims for any infringement, "real or alleged," of said patents, and of obtaining license from each other to manufacture under said patents; and "in consideration of the premises, and of certain valuable consideration," (not stated) they enter into the contract. As the plaintiff and the Vigorit Company had no patent, it is obvious that the consideration moving from them was their covenant to refrain from competition in the dynamite business, and that they had no patent rights to "interchange." In some text-books and decisions it has been stated, generally, that the rule about contract in restraint of trade being void does not apply to patent rights; but, as applied in the adjudicated cases, it means only that a trader may sell a patent right, or a secret in his trade or art, and restrain himself generally from the use of it, or from other acts which would lessen the value of the patent sold. And, of course, as a patent is a sort of monopoly, the owner may manufacture under it or not, as he pleases; and may make either a partial or entire assignment of it; and may protect his assignee, not only by an agreement not to use the patent (which would be unnecessary, because such use would be an infringement), but by a covenant not to interfere in any way with the profits to be derived from the assigned patent. The cases cited by appellant (Twist, etc., Co. v. Morse, 103 Mass. 73; Taylor v. Blanchard, 13 Allen (Mass.) 370; Stearns v. Barrett, 11 Amer. Dec. 227; Mackinnon P. Co. v. Fountain Ink Co., 48 N. Y. Super. Ct. 447; Jarvis v. Peck, 10 Paige (N. Y.) 118) go no further than this. Indeed, most of those cases go upon the old rule that there may be a contract in partial restraint of trade, independent of the right of the patentee, and upon the principle applied in section 1673 of our civil code to the sale of the good will of a business. But no case has been cited in which it has been held that several persons or companies can legally enter into a business combination to control the manufacture or sale or price of a staple of commerce merely because some of the contracting parties have letters patent for certain grades of that staple. Indeed, the contract before us is not confined to dynamite produced under the processes of the named patents. It speaks in places of "dynamite" generally, and provides that the contract may be terminated if "other party or parties shall begin the business of manufacturing and selling dynamite within the territory named, in competition to the parties hereto;" thus recognizing the probability of other persons, not having the patents named, entering into the business of making and selling the very commodity that is the subject of the contract. * * *

SAMUELS ET AL. v. OLIVER ET AL.

1889. 130 Ill. 73, 22 N. E. 499.

APPELLEES employed appellants, (who were brokers), to purchase and sell grain, with the purpose of "cornering" the market, or controlling the price thereof, and this fact was known to the brokers.

PER CURIAM:—* * * Public policy will not permit appellants to recover for the money advanced by them in the illegal business of appellees, nor will the law give an action to appellees to recover from appellants moneys paid to them by other parties in the prosecution of such illegal enterprise. *Ex turpi causa, non oritur actio.* The enhancement of the price of an article of prime necessity, such as wheat or other articles necessary for food, for purposes of extortion, is against public policy. (Fuller v. Dane, 18 Pick. (Mass.) 472; DeWitt v. Brisbane, 16 N. Y. 508.) "Combinations whose object is to create what are known as 'corners' in the market, or to control the traffic in any staple which is a popular necessity, or to enhance the price thereof, or to withhold the same from the market, are illegal." (Greenhood on Public Policy 642; Wright v. Crabb, 78 Ind. 487; Craft v. McConoughy, 79 Ill. 346.) Such a transaction, if had in this state, would be void, as being in contravention of the criminal code, § 130, chap. 38; Schneider et al. v. Turner, 130 Ill. 28.

An agreement to make a corner in stock, by buying it up so as to control the market, and then purchasing for future delivery, is illegal, and a party thereto whose funds have been used, by his consent, in carrying out the agreement, cannot recover the same back. (Sampson v. Shaw, 101 Mass. 145.) So it has been held that one who loans or advances money to be used for the purpose of making a corner in wheat, cannot recover. (Lehman v. Leavitt, 46 Mich. 447.) So, also, money paid in furtherance of an illegal transaction or purpose cannot be recovered by the party advancing the same. Ball v. Gilbert, 12 Met. (Mass.) 397; Dixon v. Olmstead, 9 Vt. 310; Wheeler v. Russell, 17 Mass. 258; The People v. Fish, 14 Wend. (N. Y.) 9.

When the employment of an agent relates to the performance of an immoral or illegal act,—it is said by Wharton in his work on Agency (sec. 25,)—neither party can make the contract the basis of a suit against the other. Advances for illegal purposes fall within the same rule, and cannot be recovered by the principal of the agent, or the agent of the principal. (*Id.* sec. 319.) It follows, therefore, that if one party cannot maintain an action in respect of matters growing out of his employment, on account of its being illegal or contrary to public policy, neither will an action lie against him by one participating in the illegal transaction conducted in pursuance of such employment. It would seem self-evident that if the agent

who merely aids the principal in the prosecution of an illegal business cannot recover for services or money advanced by him in the conduct of the business, the master or principal should not be permitted to recover against the agent for moneys received by him in the course of such business.

If there was no question of illegality involved in this transaction, then, on a settlement, the agent clearly should be allowed for his reasonable commissions, and the amount of money necessarily and properly advanced by him for his principal, and should be charged with the moneys received in the course of the business, belonging to the principal. * * * But the contract of employment, and the transaction in which they are engaged, being against public policy, the contract, so far as it remains executory, cannot be enforced by either party, nor can either party maintain an action against the other for any right growing out of such contract, or of the illegal transaction in which they were engaged. The law simply refuses its assistance to either party. * * *

GIBBS v. CONSOLIDATED GAS CO.

1889. 130 U. S. 396.

FULLER, C. J.—The plaintiff sought to recover compensation for services alleged to have been rendered by him to the defendant in securing the contract in question between the defendant and the Equitable Gaslight Company of Baltimore. * * * It will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed except that, in case of competition, the rate might be lowered by one, but not below a certain specified rate, without the consent of the other. * * *

The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. New Orleans Gaslight Co. v. Louisiana Light & Heat Co., 115 U. S. 650; Louisville Gas Co. v. Citizens Gaslight Co., 115 U. S. 683; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530; St. Louis v. St. Louis Gaslight Co., 70 Mo. 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (Printing Co. v. Sampson, L. R. 19 Eq. 462), yet, in the instance of business of such character that it presumably can not be

restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in W. Va. Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; Chicago Gaslight & C. Co. v. People's Gaslight & C. Co., 121 Ill. 530; Western Union Teleg. Co. v. American Union Teleg. Co., 65 Ga. 160.

The decision in Mitchel v. Reynolds, 1 P. Wms. 181 Smith's Leading Cases, Vol. 1, Pt. II, 508, is the foundation of the rule in relation to the invalidity of contract in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Rousillon v. Rousillon, L. R. 14 Ch. Div. 351; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345.

"Cases must be judged according to their circumstances," remarked Mr. Justice Bradley in Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a benefit to the other party, it is free from objection, and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld. The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn—or in evasion of—what the law has established; all promises in-

terfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong—are void." Bishop, Contracts, § 549; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, decided at this term, opinion by Mr. Justice Field; Trist v. Child, 88 U. S. 21 Wall. 441; Irwin v. Williar, 110 U. S. 499; Arnot v. Pittston & E. Coal Co., 68 N. Y. 558; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Woodruff v. Berry, 40 Ark. 261; Hartford & N. H. R. Co. v. New York & N. H. R. Co., 3 Robt. (N. Y.) 411; Craft v. McConoughy, 79 Ill. 346; Hooker v. Vandewater, 4 Denio (N. Y.) 349; Stanton v. Allen, 5 Denio (N. Y.) 434; Central R. Co. v. Collins, 40 Ga. 582; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

"Where," says Mr. Justice Miller, delivering the opinion of the court in Thomas v. West Jersey R. Co., 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with their property and wind up their business; but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of

the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they simply desired to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity generally of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gaslight Company from entering into it. That prohibition declared the policy of the State as well as restrained the particular corporation.

The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as "There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal" (Bank of United States v. Owen, 27 U. S., 2 Pet. 527, 539), it is clear that contracts in direct violation of statutes expressly forbidding their execution, cannot be enforced.

The question is not one involving want of authority to contract on account of irregularity of organization or lack of an affirmative grant of power in the charter of a corporation, but a question of the absolute want of power to do that which is inhibited by statute, and, if attempted is in positive terms declared "utterly null and void."

"The rule of law," said Parker, Ch. J., in Russel v. DeGrand, 15 Mass. 35, 39, "is of universal operation, that none shall, by the aid of a court of justice obtain the fruits of an unlawful bargain."

We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed.

HARDING ET AL. v. AMERICAN GLUCOSE COMPANY ET AL.

1889. 182 Ill. 551, 55 N. E. 577.

MAGRUDER, J.— * * * A question of law, which arises in the case, is whether the facts, set up in the bill, constitute an illegal trust. The pleadings in the case are in somewhat singular condition. Some of the defendants answered the bill. One of the defendants to the amended bill filed a paper, which was in part an answer, and in part a demurrer. Others of the defendants demurred to the whole bill. All the demurrers, both in whole and in part, were sustained by the trial court. We are of the opinion that they should have been overruled.

A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor

from the trustees. But the question in the present case is, whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation, organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void. (2 Cook on Corporations—4th ed.—sec. 503a.) It makes no difference, whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is affected by creating a new corporation and conveying to it all the property of the competing corporations. The test is, whether the necessary consequence of the combination is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as thereby to create a monopoly. The demurrers confess the truth of the allegations in the bill; and those allegations are, that a trust was created, or proposed to be created, by the organization of a new corporation and the conveyance thereto of all the property owned by the six competing corporations, and the execution of agreements by the corporations, thus parting with their property, not any longer to engage in the manufacture of the industrial products in which they had been previously engaged. Six corporations were engaged in the manufacture of glucose, which can only be manufactured in a certain district or extent of country, and, with the exception of one small plant, were the only corporations engaged in such business. The allegations of the bill show, that the ability to prosecute such business was rare, and that it is difficult for new parties, not familiar with it, to engage in it. Necessarily, when corporations thus situated unite together all their properties in one new organization, and permit the latter to operate their properties, competition will be suppressed, and the new corporation will possess the power to limit production and control prices. All the competing corporations have been put out of the business by disposing of the plants, with which they conducted their business. The grantee of said corporations has no competitor in the market.

The public policy of a State is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials. When the legislature speaks upon a subject, upon which it has the constitutional power to legislate, public policy is what the statute, passed by it, indicates. (United States v. Freight Assn., 166 U. S. 290.) The public policy of the State of Illinois has always been against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly.

In Craft v. McConoughy, 79 Ill. 346, we held it to be a well settled rule of law, that an agreement in general restraint of trade is contrary to public policy, and is illegal and void.

In People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, we forfeited the charter of a company, on the ground that it was formed to bring about an illegal combination; and held that an agreement, tending to prevent competition and create a monopoly, is void by the principles of the common law, because it is against public policy, and that public policy favors competition in trade, and is opposed to monopoly, as tending to advance market prices to the injury of the general public.

In Moore v. Bennett, 140 Ill. 69, we held again, that contracts, restraining the freedom of trade, diminishing competition, or regulating the prices of commodities, are prohibited by law; and that all combinations of capitalists and of workmen in their especial favor, by raising or reducing the prices, are so far illegal, and that agreements to combine for such purposes will not be enforced by the courts.

Again, in Bishop v. American Preservers' Co., 157 Ill. 284, we held that an agreement providing for the welding together of all the interests, engaged in a certain business, in one giant combination under the absolute dominion and control of a board of trustees, was void as contrary to public policy.

It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties. In the present case each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding, that each of five other competing corporations was making the same kind of contract, and executing the same kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations, and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily result in the suppression of competition in the manufacture of glucose, and in the creation of a monopoly in that business. A part of the scheme was, that none of the six corporations or their officers should, for years engage in the manufacture of glucose, and this feature of the scheme necessarily contemplated a wiping out of all competition in the business.

In Distilling, etc., Co. v. People, 156 Ill. 448, we held that a

combination to control the manufacture and sale of all distillery products, so as to stifle competition and regulate and dictate prices, was an illegal attempt to create a monopoly, and that an organization, which has a tendency to create a trust and constitute a monopoly, is contrary to public policy and unlawful. In the latter case, it was claimed that the illegal character of the combination was removed by a change of organization, so as to have the properties of the combining distillery companies transferred directly to the new corporation organized for that purpose; but it was held that this change was formal rather than substantial, and that the same interests were controlled by the same agencies, as had controlled them under the former organization. So it is in the case at bar; the men, who control the new corporation, which was organized, to-wit, the Glucose Sugar Refining Company, are the same men, for the most part, who were interested in, and controlled some one or more of the six corporations, which disposed of their plants. Many of the stockholders in the old corporations are holders of stock in the new corporation.

In Distilling, etc. Co. v. People, *supra,* this court spoke with approval of the case of Richardson v. Buhl, 77 Mich. 632; and, in the Michigan case, it appeared that the corporation, known as the Diamond Match Company, was organized to manufacture, buy, sell, and deal in friction matches, etc., and that the real object of the corporation was to buy up the property of all the corporations, or of individuals, engaged in the manufacture of friction matches, exacting from the seller in the several cases a bond that he would not for a term of years engage in, or aid any one else in, the manufacture of matches in any place where his action might conflict with the interests, or diminish the profits of the Diamond Match Company; and in that case the purposes of the company were declared to be unlawful, and it was held that any contract made to further them was void as against public policy. In Distilling, etc. Co. v. People, *supra,* we used, in reference to this Michigan case, the following language (p. 489): "It was held that a corporation, organized for the purpose of controlling the manufacture and sale of friction matches, and by means of which all competition was stifled, and opposition crushed, and the whole business of the country in that line engrossed by the corporation, was a menace to the public, its object and direct tendency being to prevent fair competition and to control prices; that it is no answer to say that the monopoly had in fact reduced the prices of friction matches; that such policy may have been necessary to crush competition; that the fact exists that it rests in the discretion of the corporation to raise prices at any time to an exorbitant degree; and that such combinations have frequently been condemned by courts as unlawful and against public policy."

The material consideration in the case of such combinations is, as

a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation, taking all the plants of the several corporations, to raise prices at any time, if it sees fit to do so.

It does not relieve the trust of its objectionable features, that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors.

In the case at bar, however, the proof shows that, upon the completion of the new organization, and as soon as it began to operate the several plants conveyed to it, the price of glucose and its various products began to go up. One of the witnesses testifies that, in May, 1897, the price of glucose was about seventy-five cents (75 cts.) per one hundred pounds, and that, after that, it began to go up, and went as high as $1.65 per one hundred pounds. * * *

In New Jersey and Pennsylvania, however, combinations of capital are now favored, although they destroy competition and create monopolies. Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507; 43 Atl. 723; Monongahela, etc., Co. v. Jutte, 210 Pa. 288; 59 Atl. 1088.

By act of congress, July 2, 1890, it is declared: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is * * * illegal." U. S. Comp. St. 1901, p. 3200.

Cases held to be within the provisions of this act: United States v. Trans-Missouri Freight Asso., 166 U. S. 200; United States v. Joint-Traffic Asso., 171 U. S. 505; United States v. Addyston Pipe & Steel Co., 85 Fed. 271; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; W. W. Montague & Co. v. Lowry, 193 U. S. 38; United States v. Northern Securities Co., 120 Fed. 721; Northern Securities Co. v. United States, 193 U. S. 197.

The Standard Oil Co. v. United States, May 15, 1911; American Tobacco Co. v. United States, May 29, 1911.

Cases held not to be within its provisions: United States v. E. C. Knight Co., 156 U. S. 1; Hopkins v. United States, 171 U. S. 578; Anderson v. United States, 171 U. S. 604.

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§ 65 (H)—Suppressing Competition at Sales by Auction.

INGALLS v. ROWELL ET AL.

1894. 149 Ill. 163, 36 N. E. 1016.

BAILEY, J.—* * * It is a well recognized rule, that where a person, desirous of purchasing property at auction, prevents others, by his improper conduct, from bidding against him, and

thus succeeds in purchasing the property at less than its fair market value, the sale will be set aside. So, agreements not to bid at a public auction are in general void, as against public policy, and tending to fraud, and such agreements, at least when brought about or participated in by the purchaser, will vitiate the sale. See Am. & Eng. Ency. of Law, 997, and authorities cited. As said in Wilson v. Kellogg, 77 Ill. 47: "The law may be regarded as well settled, that the greatest fairness is required of those intrusted by law to conduct judicial sales, and of those who purchase at such sales; and any agreement, contract or arrangement entered into, on the part of the bidders, calculated to stifle competition at the sale, is contrary to public policy, a fraud upon the law, and would vitiate the sale." See also, Lloyd v. Malone, 23 Ill. 43.

It requires no argument to show that the conduct of Ingalls, as disclosed by the evidence, had a direct tendency to stifle and prevent competition at the sale, and we think it a fair inference from all the evidence that it did in fact have that effect. It should be noticed that the influences used by him were all brought to bear while the sale was in progress, and upon persons who were present as bidders and were actually bidding. The case is clearly distinguishable from those where several persons desiring to obtain distinct portions of a tract of land about to be sold at auction, agree that one of their number shall bid for the benefit of all, and in case he succeeds in making the purchase, shall divide the land according to their agreement. It is also distinguishable from those cases where one is deputed to bid as the agent of another, with specific directions as to how and how much he shall bid. Arrangements of this kind, entered into before the sale, are held to promote rather than stifle competition. Such, however, was not the case here. * * *

GULICK ET AL. v. WARD ET AL.

1828. 10 N. J. L. 87.

IN this case defendants agreed to give plaintiffs $1,000 on condition that plaintiffs would forbear to propose or offer themselves to the postmaster-general to carry the mail on a certain railorad.

EWING, C. J.—This action was brought to recover the sum of $1,000, stipulated in a written agreement, to be paid by the defendants to the plaintiffs. Upon the trial at the Circuit Court, the defendants insisted that the promise was void, because the consideration was illegal, and the plaintiffs were therefore not entitled to recover. The judge reserved the question for determination here, and a verdict was rendered for the plaintiffs, which the defendants now seek to set aside. * * *

Pursuant to the requirement of the act of congress, the postmas-

ter-general had given public notice of his intention to contract, and his readiness to receive proposals, for carrying the mail between the cities of Philadelphia and New York. The parties in this suit, in consequence of this notice, attended at Washington, intending to offer proposals, when the arrangement stated in the declaration was there made between them, the plaintiffs relinquished their intention, and the contract was made by the postmaster-general with the defendants.

The policy of the provision contained in the act of congress requiring this procedure by the postmaster-general, in thus publicly inviting proposals is, to enlarge the number of offers, to increase the competition among persons disposed to contract, and thereby not only to secure to the United States faithful and capable carriers, but to procure the performance of this important public service in the best manner, and upon fair, just, and reasonable terms. The principle is the same as requires a sheriff or executor to give public notice of the sale he is about to make, or induces an individual publicly to announce the vendue of his property. Now an arrangement which shall diminish the number of competitors, lessen the number of proposals, or induce any one or more to abandon his intention of making an offer to contract, is most evidently in direct contravention of the policy of the act of congress, and tends to defraud, or perhaps it may be broadly asserted, does at all times actually defraud the United States. It defeats the policy of the statute, for it destroys the competition and precludes the advantages which inevitably result from it. The expense to the government is certainly augmented. Of two individuals who are willing to perform the service for the same remuneration, one may, for various reasons, be far more eligible than the other. But the most eligible may be induced to withdraw. It operates to defraud the United States. The premium paid to prevent competition is directly or indirectly charged upon them. The terms proposed are always calculated to cover the expenditure. The corollary is indisputable, that if the successful contractor can afford to pay one thousand dollars to induce a rival to stand out of his way, he can, if not compelled to make such payment, afford to perform the service for precisely that sum less than the recompense he is to receive from the postmaster-general. To the contractor it is exactly the same, whether he reduces the sum he requires from the public one thousand dollars, or whether he pays that sum to his intended competitor. If in the present case, the defendants could afford to pay to the plaintiffs one thousand dollars, it is conclusive evidence that they required of the public that sum more than the service they were to perform was justly worth. The evidence produced on the trial of this cause, and detailed in the state of the case before us, fully proves the truth of these remarks, the importance of the competition, and the effects of it upon the interest of the public service.

After the defendants had induced the plaintiffs, to abandon their intention of making proposals, and had exhibited their offer, they discovered very unexpectedly another competitor, and that another proposal was made which they had not anticipated nor silenced. They immediately lowered their proposal one thousand five hundred dollars, and this too, to prevail against persons who were not like the plaintiffs, "well provided with horses, stages, sulkies, and drivers," and who had, not like them, been accustomed to carry the mail on the route in question, and whose ability and experience the postmaster-general might therefore justly hold in high estimation. The circumstances disclosed on the trial, then, most manifestly support the conclusion naturally drawn from the agreement itself; that in object and effect it was inconsistent with the policy of the act of congress, and tended, to say the least, to defraud the United States.

The principles of law, which compel a court to refuse to enforce a promise founded on such consideration, are very clear, very salutary, and perfectly well established. In Jones v. Randall, Cowp. 39, Lord Mansfield and the Court of Kings Bench, held that "many contracts which are not against morality, are still void as being against the maxims of sound policy." In Blachford v. Preston, 8 T. R. 95, Lawrence, J. said "a plaintiff cannot recover in a court of justice, whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice of third persons." And on that ground, as well as because it was contrary to the principles of public policy to allow of such contracts as that before the court, he held that the plaintiff could not maintain his action. * * *

It was insisted by the plaintiff's counsel, on the argument, that some of these cases have no application here, because the proceeding on the part of the postmaster-general is not an auction. It is of very little importance by what name it is most aptly to be designated, if the principles illustrated by these cases may be justly brought to bear upon it. Yet is there any radical difference? Is a proposal in writing less a bid than a verbal offer? Is the Dutch mode of sale not an auction, because the biddings are downward? Does it lose the name of auction when it happens that no more than one bid has been made by any one bidder when the article is struck off? May not a sheriff or executor, like the postmaster-general, if no just and competent offer be made, decline, by striking off the property, to accept either and adjourn the sale to a more favorable season, and for new and better offers? Is not the competition equally desirable in the one as in the other case? Is not the combination, which may silence a bidder alike prejudicial? If a party be bought off, does it not in both cases prevent a fair competition? Is not the abstaining from bidding under the promise of a benefit as much in the one as in the other case, an evil which the law does

and ought to repress? It may not be unworthy of notice, though it may not deserve to aid the argument, that the postmaster-general in his advertisements, one of which I have recently seen, speaks of the persons offering proposals as bidders. * * *

PHIPPEN v. STICKNEY.

1841. 3 Met. (Mass.) 384.

IN this case there was an agreement between defendant and plaintiff that plaintiff would permit defendant to buy a tract of land which was to be sold at auction, and that defendant would buy it and convey a certain part thereof to plaintiff. The defendant purchased the land at the auction under this agreement, the plaintiff refraining from any bid on account of the agreement.

DEWEY, J.—The principal question in the present case is, whether the contract entered into by these parties is invalid in law, as contravening established principles of public policy, and injurious, in its tendency and effect, to the interests of those who may be concerned in sales at auction. * * *

The case of Gulick v. Ward, 5 Halst. (N. J. L.) 87, strongly supports the general doctrine, that such contracts cannot be enforced, as legal and valid contracts.

On the other hand, there are decisions supporting the doctrine that there may be allowed in auction sales the practice of by-bidding, if it be *bona fide,* and for the sole purpose of preventing a sacrifice of the property offered for sale. Wolfe v. Luyster, 1 Hall (N. Y.) 146; Jenkins v. Hogg, 2 Const. (S. C.) 821, Chit. Con. (4th Amer. ed.) 238, note. In Smith v. Greenlee, 2 Dev. (N. Car.) 126, the court of North Carolina, while they sustain the general doctrine that a sale might be avoided when made to one in behalf of an association of bidders designed to stifle competition, yet concede that this rule would not apply to an association of bidders formed for honest and proper purposes, as in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder exceeded the amount which individuals might wish to purchase on their own account.

It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we cannot judicially declare that every contract between two or more individuals, in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void as a fraud upon the rights of the vendor and as against public policy, merely because

he who seeks to enforce the contract may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed are of frequent occurrence in sales of large magnitude, where two or more persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding. By such an association as is just supposed, the interest of the vendor, as well as that of the vendees, would be directly advanced.

The extent to which the doctrine of invalidating such contracts can be safely carried, would rather seem to embrace within the rule all cases of fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this, the application of the principle contended for may be found productive of mischief and an unwarrantable interference with the course of business in auction sales. We are therefore of opinion, that an agreement between A. and B., that A. will permit B. to become the purchaser of certain property about to be offered at sale at public auction, and that A. shall participate with B. in the benefits of the purchase, will or will not be fraudulent, as the circumstances of the case show innocence of intention or a fraudulent purpose in making such agreement; that where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article, offered for sale, below the fair market value, it will be illegal and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding.

In the case before us, upon the facts stated, we do not feel authorized to set aside this agreement as illegal or fraudulent, upon the principles we have stated. Fraud is not to be presumed, where the contract is, on the face of it, consistent with honesty of purpose and fair dealing. If the defendant would avail himself of a defence of that character, it must be upon the finding of a jury, or upon a case stated by the parties clearly disclosing such fraudulent purpose. This contract might have been entered into by these parties, for good and justifiable reasons; and it is not, therefore, to be deemed fraudulent and void upon the face of it.

* * *

§ 66.—Agreement Designed to Further an Unlawful Purpose.

MOUND v. BARKER.

1899. 71 Vt. 253, 44 Atl. 346.

DEBT on a bond. Special plea and notice. The defendant offered to show by parol evidence that at the time the lease and bond were executed the plaintiff and the lessees understood and expected that intoxicating liquors would be sold in the hotel leased, in violation of the law, by the lessees, and that such liquors were sold therein with the knowledge of the plaintiff. The plaintiff objected to this evidence, as contradicting and varying the written lease. The objection was overruled, and the evidence received, and the plaintiff excepted.

ROWELL, J.—When an agreement, innocent in itself, is designed by one of the parties to further a purpose forbidden by the law or opposed to its policy, courts will not enforce it in favor of such party, nor in favor of the other party, if he is implicated in such design. Thus, when property is leased with knowledge on the part of the lessor that the lessee intends to use it for an illegal or an immoral purpose, and does so use it, the rent therefor cannot be recovered. Sherman v. Wilder, 106 Mass. 537; Riley v. Jordan, 122 Mass. 231; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; 2 Tayl. Landl. & Ten. (8th ed.) No. 521; Hennings v. Throgmorton, Ryan & M. 251, 21 E. C. L. 744; Smith v. White, L. R. 1 Eq. 626. Carrigan v. Insurance Co., 53 Vt. 418, is not opposed to this, for there the liquors were legitimately used in the plaintiff's drug business, though occasionally sold in violation of law, and no illegal design entered into the making of the policy. The bond in suit was given by the defendant as surety for the lessees of a hotel, conditioned for the payment by them of the rent reserved, and was executed at the same time as the lease. The lease was innocent in itself, but, at the time of its execution and delivery, both the plaintiff, who is the lessor, and the lessees, understood and expected that the hotel would be used, not only for the entertainment of guests, but that intoxicating liquor would be sold therein in violation of law; and it was so sold, to the knowledge of the plaintiff. Therefore, if this suit was upon the lease itself, it could not be maintained. It can be maintained no better on the bond, for, when the foundation fails, all goes to the ground. Riley v. Jordan, 122 Mass. 231.

Judgment affirmed.

HANAUER v. DOANE.

1871. 12 Wal. (U. S.) 342.

THIS was an action for the price of goods sold with knowledge that they were purchased for the Confederate States government.

BRADLEY, J.* * * We have already decided, in the case of Texas v. White, 7 Wall. (U. S.) 700, that a contract made in aid of the late rebellion, or in furtherance and support thereof, is void. * * *

With regard to that portion of the consideration of the notes which consisted of supplies sold by Hunter & Oakes to Hanauer for the Confederate Army, the judge instructed the jury that bare knowledge on the part of Hunter & Oakes that Hanauer intended or expected to turn the goods over to the rebel army, would not make the sale illegal and void, but that, to make it so, it must appear that Hunter & Oakes had some concern in furnishing the supplies to the rebel army, or intended to aid therein. In this instruction we think the judge erred. With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude, when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the words of Chief Justice Eyre, in Lightfoot v. Tenant, 1 Bos. & P., 551, 556, "The man who sells arsenic to one who, he knows, intends to poison his wife with it, will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. * * * No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them." On this declaration, Judge Story remarks: "The wholesome morality and enlarged policy of this passage makes it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable." Story, Conf. L., Sec. 253. Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them and intends to use them for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, "What business is that of mine? Am I the keeper of another man's conscience?" No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense and, morally speaking, is almost, if not quite, as guilty as the principal offender. No crime is greater than treason. * * * Where to draw the precise line between the cases in which the ven-

dor's knowledge of the purchaser's intent to make an unlawful use of the goods, will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members. This is all that we mean to decide in this case.

STANDARD FURNITURE CO. v. VAN ALSTINE.

1900. 22 Wash. 670, 62 Pac. 145.

APPELLANT on conveying furniture and house furnishing goods to a prostitute, knowing that she intended to put them to an immoral use, reserved the title and the right to take possession whenever it might deem itself insecure, even before the maturity of deferred payments.

FULLERTON, J.—* * * It is urged on behalf of the appellant that the evidence before the trial court upon which it based its judgment showed, at most, nothing more than that the appellant, at the time it entered into the contract of conditional sale and delivered the property to the vendees named therein, had knowledge that the vendees intended to put the property to an unlawful use; and that this fact is not sufficient to justify the trial court in its holding that the contract was void as against public policy. It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of a vendor of goods that the vendee designs to and will put them to an immoral or illegal use is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention, the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, or that of debtor and creditor, with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property were complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. On the other hand, it is held by all the cases—even those which announce the rule contended for by the appellant—that if the vendor has knowledge of the immoral or illegal design of the ven-

dee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover. Tatum v. Kelley, 25 Ark. 209; Tracy v. Talmage, 14 N. Y. 162; Hill v. Spear, 50 N. H. 253; Gaylord v. Soragen, 32 Vt. 110; Aiken v. Blaisdell, 41 Vt. 665; Schankel v. Moffatt, 53 Ill. App. 382; Ralston v. Boady, 20 Ga. 449; Webster v. Munger, 8 Gray (Mass.) 584; Adams v. Coulliard, 102 Mass. 167; Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, and note to this case in 32 Am. St. 450; Beach, Mod. Cont. § 457. And there are cases which hold that knowledge on the part of the vendor that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the supreme court of the United States in Hanauer v. Doane, 12 Wall. (U. S.) 342, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only *malum prohibitum*, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime, such as treason, as was the fact in that case. See, also, Tatum v. Kelley, *supra;* Milner v. Patton, 49 Ala. 423; Lewis v. Latham, 74 N. Car. 283; Bickel v. Sheets, 24 Ind. 1; Steele v. Curle, 4 Dana (Ky.) 381. Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved "title, ownership, and possession of the property," but reserved the right to "take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity" of the deferred payments. This practically left the control of the use of the property with the appellant, and, as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use, and

participating in that unlawful intent, is, to say the least, somewhat refined; and where a vendor, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts. It must be borne in mind that at common law it was an indictable offense to keep a house of ill fame, or to let a house knowing it was to be used for the purpose of prostitution (Whart. Cr. Law, § 1459); that in this state these acts are made misdemeanors by statute (Ballinger's Ann. Codes & St. § 7239, 7261); and that "any contract auxiliary to the keeping of a bawdy house, or otherwise encouraging prostitution, is void" (Bish. Cont. § 506; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750; Beach. Mod. Cont. § 1443). * * *

SHAFFNER v. PINCHBACK.

1890. 133 Ill. 410, 24 N. E. 867.

BAKER, J.—This is an action brought by Shaffner, against Pinchback, to recover the sum of $1,000, alleged to have been loaned by the former to the latter. Upon trial in the circuit court, verdict was rendered for the defendant, and judgment entered thereon. On appeal to the Appellate Court the judgment was affirmed, and the cause is brought to this court by writ of error.

The evidence introduced at the trial by plaintiff in error tended to prove that on August 16, 1886, he loaned to defendant in error the sum of $1,000, and that the latter was to pay him, for the use of said money, one-half of the net winnings of a certain "book making" business at horse races, to be conducted and managed by defendant in error. It also tended to prove that said business was a success, and won money at the Saratoga races. The evidence offered by defendant in error tended to prove that the parties each contributed $1,000, to form a capital of $2,000, to be used in the business of "making books" on horse races; that book making consists of taking and paying wagers on such races; that the parties were partners in such venture, and that the $2,000, with the exception of $30, had been lost on wagers, and that he had retained the $15, that would otherwise be going to plaintiff on an indebtedness which was due and unpaid.

It is claimed that the two instructions given at the instance of the defendant were erroneous. Those instructions were as follows:

"1. The court instructs the jury, as a matter of law, that if they believe, from the evidence, that the plaintiff and the defendant in this suit put together the sum of $1,000 each, for the purpose of betting and wagering the same on horse races, then the jury will find the issues for the defendant.

"2. The court instructs the jury, as a matter of law, that if they believe, from the evidence, that the plaintiff and the defendant were co-partners in the business of making books on horse races, and that the money given the defendant by the plaintiff was in furtherance of said partnership business of book making on horse races, then the jury will find for the defendant."

That betting money on a horse race is gaming, and in violation of law, was decided in Tatman v. Strader, 23 Ill. 494, and that a contract in aid of the offense of gaming, which is prohibited by statute, is void, and can not be recovered upon, was held in Mosher v. Griffin, 51 Ill. 184. It is probable that the instructions complained of would have been proper enough if they had been predicated only upon the testimony introduced by the plaintiff. But waiving that question, they were based upon the theory of the facts that the defendant's evidence tended to prove, and were fully justified by that evidence.

It is suggested that defendant occupied the position of a stakeholder, and the well recognized rule that money may be recovered by the depositor from the stakeholder, if it has not been paid over, is sought to be invoked—hence, it is said, these instructions were erroneous, in that they ignored the question whether the money was lost on the bets, and had been paid out by the defendant. The evidence for defendant was to the effect that the venture in which plaintiff's $1,000 was invested was a joint or partnership venture, each of the parties contributing one-half of the capital, and that they were to divide the proceeds equally. If this be true, defendant was not a stakeholder, but a partner of the plaintiff in the book making business.

It is urged that the view that defendant can keep the $1,000 furnished by plaintiff, without any consideration therefor, is so opposed to reason and conscience as to be untenable. The judgments of the trial and of the Appellate Courts are conclusive of the fact that plaintiff and defendant jointly engaged in a business which was in violation of law. They were, in respect to such business, *in pari delicto,* and the law will refuse its aid to assist either, but will leave them in the positions in which they have placed themselves. Plaintiff in error having embarked his money in an enterprise prohibited alike by the statute, by good conscience and by public policy, placed himself and his money outside of the pale of the law, and if he has been despoiled by the failure of his associates to account for the funds placed in his hands for the purpose of carrying on the unlawful business, then both good morals and public policy require that

the law should not aid him. We find no error in the instructions of which complaint is made.

The judgment is affirmed.

ARMSTRONG v. AMERICAN EXCHANGE NAT. BANK.

1889. 133 U. S. 433.

BLATCHFORD, J.— * * * Where losses have been made in an illegal transaction a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. Armstrong v. Toler, 24 U. S. 11 Wheat. 258; Kimbro v. Bullitt, 63 U. S. 22 How. 256, 269; Planters' Bank v. Union Bank, 83 U. S. 16 Wall. 500; Tyler v. Carlisle, 79 Me. 210; McGavock v. Puryear, 6 Coldw. (Tenn.) 34; Waugh v. Beck, 114 Pa. St. 422.

It is not shown, as is claimed by the receiver, that in advancing the money to Kershaw & Co., the plaintiff became a participator in an illegal attempt to corner the market, or that it had aided in such an attempt by previously advancing money to them upon a part of the wheat as collateral security. Although the plaintiff had advanced money from time to time to them upon wheat as collateral security, there is no evidence that it knew, or had any reason to suspect, that the wheat was purchased in an attempt to corner the market.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. Armstrong v. Toler, 24 U. S. 11 Wheat. 258; Faikney v. Reynous, 4 Burr. 2069; Petrie v. Hannay, 3 T. R. 418; Farmer v. Russell, 1 Bos. & P. 296; Planters' Bank v. Union Bank, 83 U. S. 16 Wall. 483; McBlair v. Gibbes, 58 U. S. 17 How. 232, 236; Brooks v. Martin, 69 U. S. 2 Wall. 70; Bly v. Second Nat. Bank, 79 Pa. St. 453. * * *

MONEY PAID OR PROPERTY DELIVERED UNDER UNENFORCABLE AGREEMENTS.

§ 66 (A)—General Rule.

DENT ET AL. v. FERGUSON ET AL.

1889. 132 U. S. 50.

IN this case the instrument which the complainants most especially sought to have delivered up and cancelled purported to be an absolute agreement and conveyance of a large amount of real property situated in Memphis, Tenn., executed by Ferguson to Dent.

LAMAR, J.—* * * The instrument itself was executed under circumstances which would lead a court to presume fraud upon creditors. It was a conveyance by a person deeply indebted, in anticipation of decrees and judgments, which, added to the existing incumbrances, amounted to the value of his property. We, therefore, agree with the district judge on this point, that the real contract was one between Ferguson and Dent to defraud the creditors out of the property conveyed, and to so conceal and cloud the title that they could be circumvented, hindered and delayed, and coerced into settlements and compromises. We think the evidence shows beyond doubt that Ferguson willingly participated for ten years in carrying out this plot. Both parties knew that $10,000 could not be saved for Ferguson, or any residuum out of the property for Dent, unless creditors could be wrought upon by some means to accept less than their claims. Neither party to such a contract could have been deceived or imposed upon about that result. Both knew the record fact, that the incumbrances perfected, and the incumbrances rapidly perfecting, exceeded in amount the value of the property. * * *

The question arises—if a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for eleven years acquiesces and concurs in the devices, collusive suits and impositions upon the court in furtherance of this purpose, without taking a single legal step to annul said conveyance or to stop such proceedings—will a court of equity aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished? This court has answered that question in the negative in Randall v. Howard, 67 U. S. 2 Black 585. In that case the complainants and defendants had made an agreement to defeat the claims of third persons to certain lands which the complainants had mortgaged to the defendant to secure a debt, so as to cloak the ownership by means of a foreclosure sale at which the defendant should purchase and hold the nominal title. After obtaining the title, he fraudulently dispossessed the complainants and asserted the right of ownership in himself. The prayer of the bill was to restrain the defendant from disposing of the land, and to restore it, or so much of it as remained after paying the debt, to complainants. The court, Mr. Justice Davis delivering the opinion, held that the agreement was a fraudulent one to defeat a claim set up by other parties for a portion of the mortgaged lands by the covering up, through the aid of the court, the real ownership of the property; and said (p. 588): "A fraudulent agreement was entered into to defeat, as is charged, 'a fraud attempted against the complainants. * * *' A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim, *'in pari delicto potior est conditio defendentis,'* must prevail. It is against the policy of the law to enable either

party in controversies between themselves to enforce an agreement in fraud of the law, or which was made to injure another," citing Story's Equity, vol. 1, § 298; Bolt v. Rogers, 3 Paige (N. Y.) 156, and Wilson v. Watts, 9 Md. 356.

The same principle was applied in Wheeler v. Sage, 68 U. S. 1 Wall. 518. In that case an agreement was entered into between complainants and defendants to secure the title to valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors, which the defendant violated, and, in conjunction with another person, secured an interest in the property to himself. The bill prayed that he be declared a trustee for the complainants, and required to convey to them that portion of the land to which, under the agreement, they were entitled. The court, Mr. Justice Davis delivering the opinion, said (p. 529): "Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him." And then, after a review of the evidence in that case, the opinion concluded in these words: "A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, *in pari delicto*," etc. * * *

We find no authority for the idea that it is the province of a court of equity to make a fraudulent debtor the special object of its favor because he has not received a large enough consideration for his "confessed fraud." That court is not a divider of the inheritance of iniquity between the respective heirs of two confederates in fraud. Mr. Justice Baldwin, delivering the opinion of the court, in Bartle v. Coleman (Nutt), 29 U. S. 4 Pet. 184, 189, uses the following language: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws." Or, as Chancellor Walworth states it: "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct." Bolt v. Rogers, 3 Paige (N. Y.) 157.

The cases relied upon by the court below to sustain its position do not shake the authorities we have cited to show that courts of equity refuse to annul and also to enforce contracts in fraud of the rights of others, when called to act as between the parties. For there is a distinct class of decisions affecting subsequent and collateral contracts not partaking of the fraud which infects the main transaction.

The principles established by those decisions in diversified forms, according to the varying cases, is that a new contract, founded on a new and independent consideration, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits. If the new contract be fair and lawful and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud, imposition or undue influence, it will be rescinded and justice done to the parties. Armstrong v. Toler, 24 U. S. 11 Wheat. 258; McBlair v. Gibbes, 58 U. S. 17 How. 232; Brooks v. Martin, 69 U. S. 2 Wall. 70; Planters Bank v. Union Bank, 83 U. S. 16 Wall. 483; Union Pac. R. Co. v. Durant, 95 U. S. 576.

But in all of those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them do not trench upon the line which separates the cases of contracts invalid in consequence of their illegality from new and subsequent contracts arising out of the accomplishment of the illegal object, is not the subject of inquiry here. The present case does not involve any question of a subsequent and distinct contract, but seeks relief directly from the original fraud, to which the person under whom complainants claim was a contracting party, fully sharing in the fraudulent intent. * * *

EMBREY v. JEMISON.

1889. 131 U. S. 336.

HARLAN, J.— * * * Whether the validity of the original contract for the purchase of future-delivery cotton must depend upon the New York statute or upon the Virginia statute, it is not important to determine; for, if such contract, as alleged, is a wagering contract, it is void under the law of either state. The plea makes a case of money advanced by the plaintiff's firm solely for the purpose of carrying "cotton futures," for which he or they contracted, when, according to the averments of the rejected plea, neither party contemplated the purchase or delivery in fact of cotton, and when it was understood that any settlement, in respect to such purchases,

should be exclusively upon the basis of one party paying to the other only "the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market." If this be not a wagering contract, under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. Mr. Benjamin, in his Treatise on Sales (Vol. 2, 6th Am. ed. by Corbin, p. 716, § 828), after stating that at common law wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited, says: "It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them." "But such a contract," he proceeds to say, "is only valid where the parties really intend and agree that the goods are to be delivered to the seller, and the price to be paid by the buyer. If, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute." The statute referred to by the author is that of 8 and 9 Vict. chap. 109, § 18, which provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made."

In Irwin v. Williar, 110 U. S. 499, 508, 510, the general subject of wagering contracts was carefully considered, and in the opinion, delivered by Mr. Justice Matthews, we expressed approval of the doctrine as announced by Mr. Benjamin, observing that generally in this country, all such contracts are held to be illegal and void as against public policy. It was there said: "It makes no difference that a debt or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." Referring to the decision in Rountee v. Smith, 108 U. S. 269, it was further said: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such case, being innocent of any violation of law, and not suing to enforce

an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis,* and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." In the present case, according to the averments in the plea of wager, the plaintiff was the broker who effected the purchases of future-delivery cotton. He was privy to the unlawful design of the parties; represented one of them in all the transactions; and advanced the money necessary to carry, and for the express purpose of carrying, these cotton "futures" on account of the defendant. His position, therefore, was not that of a person merely advancing money to or for one of the parties to a wager, without having himself any direct connection with the making or execution of the contract of wager itself. He was, in every sense, *particeps criminis.*

In Bigelow v. Benedict, 70 N. Y. 202, 206, the Court of Appeals of New York said that "where an optional contract for the sale of property is made, and there is no intention on the one side to sell or deliver the property, or on the other to buy or take it, but merely that the difference should be paid according to the fluctuation in market values, the contract would be a wager within the statute." In Story v. Salomon, 71 N. Y. 420, 422, which was an action upon a written contract for an option to buy or sell certain shares of stock, and the defense was that it was illegal and void under the statute of New York against gaming, the court said: "If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal." The same principle was announced in Kingsbury v. Kirwan, 77 N. Y. 612. There are many other authorities to the same effect, but in view of our decision in Irwin v. Williar, with which we are entirely satisfied, it is not necessary to cite them. * * *

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§ 66 (A)—(1)—Circumstances of Oppression or Imposition.

EVANS v. FUNK.

1894. 151 Ill. 650, 38 N. E. 230.

Assumpsit by John Funk against Daniel Evans. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals.

WHILE a suit was pending in the Circuit Court to set aside a will of a person whose estate was pending for administration in the

Probate Court, Evans, the judge thereof, received from Funk, an heir of a legatee, $2,500, as compensation for inducing the executrix to make a compromise of such suit.

BAKER, J.—* * * Appellant contends that the prohibition of the statute against judges practicing law (Rev. St. Ch. 13, § 10) applies only to cases actually pending, and tried in the court over which he presides, and that there is no prohibition against his practicing law, or engaging in the trial of causes in other courts, or any violation of public policy involved in such practice. This position may be conceded, so far as it relates to county and probate judges in this state, when the causes they try in other courts have no connection with the business or causes pending in their own courts. But it seems to us to be entirely too narrow a construction to give to the statute to hold that when an estate is pending in the county or probate court for settlement, and that when such settlement is temporarily suspended by the contest of a will or other collateral question arising in another court, that the judge of the county or probate court can lay aside his character as a judge in the cause, and follow the case to another court and there become a partisan attorney for some interest against some other interest involved in the common estate; and after that contest is ended, and the case goes back to its own court for final administration, that he can then again assume the impartial and high duties of a judge, and settle conflicting interests in the case where he served some of the parties as an attorney as against the interest of the others.

"It seems to us the very statement of the claim and proposition suggests the only possible answer that can be given to it.

"Nor can it be material whether he was an attorney in the case as a peacemaker or otherwise, or whether his motives were good or bad. If he was there in his own interest, and for hire, both the statute and principles of public policy alike forbid that he should again act as judge in his own court where such cause or any of the matters involved, directly or incidentally, were to be again considered. We think this prohibition against appellant's right to act as an attorney in the will contest is clearly within the spirit, if not the letter of the statute. But even without any statute on the subject, the right of any one to act both as judge and attorney at different times in the same cause, or in collateral questions arising out of the same cause of action, is so clearly incompatible with an impartial, pure and unfettered administration of public justice in the courts, and so contrary to the principles of public policy, that such claim cannot be allowed under any pretense whatever.

"There was no error, therefore, in the instruction which informed the jury that appellant could not lawfully engage in that will controversy, and had no right to demand or receive the money for his services.

"The remaining question is: Can appellee recover this money

back if he paid it to appellant as his attorney, as contended by appellant? It is insisted, that if appellant had no right to appear in this case and receive payment therefor, that appellee was equally chargeable with that knowledge, and that they are both engaged in an illegal act and *in pari delicto*. This maxim of the law is invoked in aid of the defense. It is true, as a general rule, that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. But this general rule has its exceptions, arising out of necessity or from unyielding principles of public policy or from the different conditions of the parties. The different degrees of turpitude, immorality or illegality may be so great between different persons engaged in such acts that the general rule will bend to meet the demands of such case and allow a recovery. In Story's Equity Jurisprudence, § 300, it is said that 'in cases where both parties are *in delicto*, concurring in illegal acts, it does not follow that they are *in pari delicto*, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship or undue influence, or great inequality in conditions of age, so that his guilt may be far less in degree than that of his associate in the offense. And, besides, there may be, on the part of the court itself, a necessity of supporting the public interest or public policy in many cases, however reprehensible the acts of the parties may be.' In strict harmony with the principles announced by Story, are also the following cases: White v. Franklin Bank, 22 Pick. (Mass.) 181; Tracy v. Talmage, 14 N. Y. 162-193; Quirk v. Thomas, 6 Mich. 111; 1 Smith's Leading Cases 708.

"We think this case falls within this exception to the general rule, and from the strongest necessity of upholding the principles of public policy in maintaining the purity and honor of the courts of justice free from all scandal or suspicion of improper conduct on the part of the judges. These parties were not *in pari delicto*. Appellant was a lawyer, and for many years a judge. We must presume, as a matter of fact, that he was familiar with the duties and obligations that his profession and his office imposed upon him, and that he knew, as a matter of fact, that he had no right to take this retainer and appear in that lawsuit as an attorney, because the very law he was engaged in administering and upholding forbid him that right. In addition to this, he occupied a place of dignity, authority and power over the estates that came before him for settlement. Administrators and executors were in a large sense under his power and control. They had a right to trust him and rely upon his fidelity and impartiality in all things relating to the settlement of estates, and the distribution of the property and money belonging to the estates of others.

"The relation between the county or probate judge and executors and administrators, as well as heirs and legatees, is that of confidence, trust and dependence on the one hand, and authority and power on the other hand.

"Appellee, on the other hand, was not a lawyer, and was in a large degree ignorant of the statute of this state and the principles of the common law, and when in litigation was compelled to seek the assistance of those learned in the law." * * * We concur in the views thus expressed and adopt them as our own. * * *

It is said that this court has decided in numerous cases that money voluntarily paid in consideration of the payee doing, or agreeing to do, something opposed to public policy or prohibited by statute, cannot be recovered back, and that, in none of the cases decided in this court, did the court inquire into the relative degrees of delinquency or immorality of the parties, but assumed that participation in doing the thing opposed to public policy, or that was forbidden by the statute, put the parties *in pari delicto*. Counsel have manifestly overlooked the case of Baehr v. Wolf, 59 Ill. 470. There both parties were *in delicto,* and Wolf brought suit to recover property that he had transferred to Baehr; and we there said: "One party may not make use of his peculiar power over another to procure a contract which, in itself, is illegal, and contrary to public policy, and then invoke the aid of the law to enable him to retain that which he has obtained through fraudulent practices and artifices. It would contravene the settled law that the courts will protect the citizen against all such acts of oppression and deceit." The distinction which the law makes as between parties *in delicto* and parties *in pari delicto,* is fully recognized by the authorities. The law that governs in cases where the parties are not *in pari delicto,* is well stated by Lord Mansfield in Browning v. Morris, 2 Cowper 790, in language which seems peculiarly applicable here. He there says: "But where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there, the parties are not *in pari delicto;* and, in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." And the rule is formulated in Rule 98, of Greenhood on Public Policy, thus: "But where money is paid to one in consideration of something opposed to public policy, or on a contract opposed thereto, and there is a moral compulsion on the part of the payer to pay it, or to make the contract; or where the law regards the payee as the principal offender, and its policy is aimed at his part in the transaction, and is adopted for the payor's protection, * * * it may be recovered. * * *

Judgment affirmed.

§ 66 (A)—(2)—Object or Design Unexecuted.

CONGRESS AND EMPIRE SPRING CO. v. KNOWLTON.

1881. 103 U. S. 49.

WOODS, J.— * * * There was no performance of the contract whatever by the Company, and only a part performance by Knowlton.

It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered back, the other party not having performed the contract, or any part of it, and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition.

Their result is fairly stated in 2 Comyn on Contracts, 361, as follows:

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto,* neither of them can recover from the other the money so paid, but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on Contracts, Vol. 2, page 746, says:

"All contracts which provide that anything shall be done which is distinctly prohibited by law or morality or public policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money."

To the same effect, see 2 Add. Cont., sec. 1412; Chit. Cont., 944; 2 Story, Cont., sec. 617; 2 Greenl. Ev., sec 111.

The views of the text writers are sustained by a vast array of authorities, both English and American.

A few will be cited. The case of Taylor v. Bowers, L. R., 1 Q. B. D., 291, was an action to recover the value of property assigned for the purpose of defrauding creditors. A verdict was rendered for plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict, the Chief Justice, Cockburn, delivering the opinion. The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice Mellish, in the Court of Appeals, said: "If the illegal transaction had been carried out, the plaintiff himself could not, in any judgment, have recovered the money. But the illegal transaction was not carried out, it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined on, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done."

The same rule substantially is laid down in the following English cases: Lowry v. Bourdieu, 2 Doug. 468; Tappanden v. Randall, 2 Bos. & P., 467; Hastelow v. Jackson, 8 Barn & C., 221; Bone v. Ekless, 5 Hurls. & N. 925; Lacaussade v. White, 7 T. R. 535; Colton v. Thurland, 5 T. R. 405; Smith v. Bickmore, 4 Taunt. 474; Munt v. Stokes, 4 T. R. 561.

In Morgan v. Groff, 4 Barb. (N. Y.) 524, it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void.

To the same effect are the following cases: Ins. Co. v. Kip, 8 Cow. (N. Y.) 20; Merritt v. Millard, 4 Keyes (N. Y.) 208; White v. Bk., 22 Pick. (Mass.) 181; Lowell v. R. R. Co., 23 Pick. (Mass.) 24.

In Thomas v. Richmond, 12 Wall. (U. S.) 349, this court cites with approval the note of Mr. Frere to the case of Smith v. Bromley, 2 Doug. 696, to the effect that a recovery can be had as for money had and received, when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus poenitentiae;* the *delictum* is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the cases, even when the parties to the illegal contract are *in pari delicto;* the question, which of the two parties is the more blamable, being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan. * * *

In many of the States there are statutes permitting the recovery of money or property lost at gaming.

In Illinois the loser by gaming or betting is allowed to recover back from the winner his loss where at any time or sitting it amounts in the whole to the sum of $10, and he brings suit within six months. Rev. St. Ill. Ch. 38, § 132.

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§ 66 (A)—(3)—Efficient Enforcement of Statute Requiring Relief.

THOMAS v. CITY OF RICHMOND.

1871. 12 Wal. (U. S.) 349.

THIS was an action of assumpsit, brought by the plaintiffs below, who are the plaintiffs in error, against the City of Richmond, to recover the amount of 842 two-dollar notes, and 418 one-dollar notes, issued by the City Council in April, 1861.

The court found as a fact that the notes upon which the action was brought were issued to circulate as currency; and, as matter of law, that this was in violation of the law and policy of Virginia, and that, therefore, the notes were void.

BRADLEY, J.—* * * "It is contended, that although the notes themselves should be deemed void, yet the City received the money therefor and ought not, in conscience, to retain it; and, therefore, that the action can be maintained on the count for money had and received.

If the defendant were a banking or other private corporation, and had issued notes contrary to law, and had incurred penalties therefor, no penalty being imposed upon the receiver or holder of the notes, this argument might be sound. In the case of Oneida Bank v. Ontario Bank, 21 N. Y. 496, in which the defendant had issued post notes contrary to a statute of New York, it was held that the holder could recover the money advanced therefor. "The argument for the defendant against this position," says Chief Justice Comstock, "rests wholly on the idea that Perry, in receiving the

postdated drafts, was as much a public offender as the bank or its officers issuing them. * * * But such were not the relations of the parties. * * * Whatever there was of guilt, in the issuing of the drafts, it was the creature of the statute. * * * By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced only against the individual banker, or the officers, agents, and members of the association. * * * If the issuing of the drafts was prohibited, and if they were also void, Perry, nevertheless, had a right to demand and recover the sums of money which he actually loaned to the defendant." This is in accordance with the general principles of law on this subject. Lord Mansfield, in Smith v. Bromley, 2 Doug. 696n, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: "If the Act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto,* but where the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover. In that case the plaintiff had given the defendant money to sign her brother's bankrupt certificate, and she was allowed to recover it back, the law prohibiting any creditor from receiving money for such a purpose. Whilst the general principle has been frequently recognized, the application of it to particular cases has been somewhat diverse. Mr. Frere, in his note to Smith v. Bromley, (*supra*) thus sums up the result of the cases: A recovery can be had, as for money had and received (1) where the illegality consists in the contract itself, and that contract is not executed—in such case there is a *locus poenitentiae,* the *delictum* is incomplete, and the contract may be rescinded by either party; (2) where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence, in such illegal conduct—in such cases there is no parity of *delictum* at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed. See the cases collected in 2 Com. Cont., 108-131; 1 Selw. N. P., 87-100; 3 Phill. Ev., 119; 2 Greenl. Ev., § 121, p. 12; Chit. Cont., 550, 552, 553, and notes.

Now, in cases of bills or other obligations illegally issued by a banking or other private corporation, which has received the consideration therefor, it would enable them to commit a double wrong to hold that they might repudiate the illegal obligations and also retain the proceeds. Hence, where the parties are not *in pari delicto,* actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves,

being against law, cannot be sued on. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who receive them whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them. But if the parties are *in pari delicto,* as, if the consideration as well as the bills or other obligation is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves.

But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires,* is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

According to these principles, no recovery could have been had against the City, either on the bills themselves or on a claim for money had and received. It was against the law of the State to issue them. It was a penal offense in both the person who paid and the person who received them, and they were issued by a municipal corporation which had no power, and which was known to have no power to issue them. * * *

SMART v. WHITE.

1882. 73 Me. 332.

PETERS, J.— * * * In Smith's Cont. 204, it is said there is an exception to the rule or maxim, *in pari delicto, potior est conditio defendentis,* "where the illegality is created by some statute, the object of which is to protect one class of men against another, or where the illegal contract has been extorted from one party by the oppression of the other." And it is there further said: "In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others, cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the act more efficacious." The English cases quoted by the author to illustrate the principle, are many and various. In Smith v. Cuff, 6 M. and Selw. 160, Lord Ellenborough says: "This is not a case of *par delictum,* but of oppression on one side, and submission on the other; it can never be predicated as *par delictum,* when one holds the rod, and the other bows to it; there was an inequality of situation between the parties."

In Curtis v. Leavitt, 15 N. Y. 9, it was held that, "where a contract otherwise unobjectionable, is prohibited by a statute, which imposes a penalty upon one of the parties only, the other party is not *in pari delicto,* and upon disaffirming the contract, may recover, as upon an implied assumpsit, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract." Other New York cases are to the same effect. Schermerhorn v. Talman, 4 Kernan (N. Y.) 93, and Tracy v. Talmage, *id.* 162, are to the same point, and contain copious citations of analogous cases. Benj. on Sales (3d Amer. ed.), § 509, note c.; and cases cited.

In White v. Franklin Bank, 22 Pick. (Mass.) 181, where a plaintiff had deposited money in a bank, repayable at a future day, in violation of a statute of Massachusetts, he was allowed to recover back the deposit, upon the ground that, although both parties were culpable, the defendants were the *principal* offenders. The court there said that, to deny the action, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to take an advantage of the unwary and those who had no knowledge of the law or the illegality of such transaction. In Lowell v. Boston and Lowell R. R. Co., 23 Pick. (Mass.) 24, the same doctrine is restated and reaffirmed, as applicable to another class of facts. In Atlas Bank v. Nahant Bank, 3 Met. (Mass.) 581, 585, the same court, speaking of the decision in White v. Franklin Bank, says: "To have decided otherwise would have given effect to an illegal contract, in favor of the principal of-

fender, and would have operated as a reward for an offense which the statute was intended to prevent." In Whalan v. Kerby, 99 Mass. 1, in construing an act relating to the sale of intoxicating liquors, the court say: "The seller and buyer of intoxicating liquors sold in violation of law are not *in pari delicto,* because the latter is guilty of no offense. When the purchaser seeks to recover back the price he has paid, the illegality of the transaction, of which he offers evidence, is wholly on the part of the defendant, and he himself is not *particeps criminis.*"

Other illustrations of the principle are found in many other cases. The doctrine is commented upon in Concord v. Delaney, 58 Maine 316; is considered in Connecticut in the case of Cameron v. Peck, 37 Conn. 555; and elaborately discussed in New Hampshire, in the cases of Prescott v. Norris, 32 N. H. 101, and Butler v. Northumberland, 50 N. H. 33, 39. * * *

THE INTERPRETATION OF CONTRACT.

CHAPTER VII.

RULES.

Where There is no Doubt.

HART v. HART.

1903. 117 Wis. 639, 94 N. W. 890.

A WIDOW, who had a life estate in a mill plant, entered into a partnership with her co-executor for a time certain, agreeing to put into the business the "use and occupation" of the mill for 14 months against his time and experience in conducting the business; the parties to share equally the expenses, losses, and profits of the business.

MARSHALL, J.—* * * The first question in the natural order of things is, what were the relations of the partnership to the plaintiff under the partnership agreement? By its terms she "put into the partnership business the use and occupation of the gristmill, with the machinery, fixtures and appurtenances thereto, and with the office furniture, scales, safe and all other movable appliances in use in connection therewith, also a certain warehouse, against J. S. Hart's time, labor, skill and attention in conducting the business of the firm, the parties to share equally in the expenses of conducting the business and in the profits, and to bear equally the losses thereof," the partnership relations to last from the date of the contract, October 22, 1865, till the 1st day of January, 1867,—a very plain, simple contract indeed. Plaintiff's counsel claim that under it the firm became, to all intents and purposes, the owner of the mill property; that as regards the questions material to this case such paper was in effect a conveyance to the firm the same as if plaintiff had put the property into the partnership venture by deed in due form. Now, to our minds, the contract is not ambiguous in any sense, therefore we cannot legitimately apply thereto the rule of practical construction for which plaintiff's counsel contends, or any other rule of construction; though we will say in passing that if rules of practical construction were to be applied they would work out far different results from those for which the learned counsel contend.

No principle is better understood than the one that the meaning apparent upon the face of an instrument, taking the words in their literal sense and as applicable to the subject-matter involved, no absurdity or contradiction appearing, must be taken as that of the parties, intended by them to be embodied therein; and that courts in dealing with the contract are not at liberty to add thereto or take therefrom. Boyle v. N. W. Mut. R. Ass'n, 95 Wis. 312, 70 N. W. 351; Johnson v. Pugh, 110 Wis. 167, 85 N. W. 641. That rule is as old as judicial construction. It is found phrased in the books in a great variety of ways, according to the notions of the authors and judges, but they all come down to this: Where there is no uncertainty of sense there is no room for construction. There is no such uncertainty in the contract in question. Under it (1) plaintiff put the use and occupation of the mill property, as it was at the date of the agreement, into the firm business for 14 months and 9 days, against the time and accomplishments of J. S. Hart to manage the business; (2) the parties agreed to share equally in all the expenses, losses and profits of the business. The use and occupation of the mill plant was contributed by plaintiff, not the mill plant itself. One would have to twist the words used in making such contribution radically out of harmony with their plain, ordinary meaning to hold that she put in the property instead of the use of the property. There can be no mistaking the meaning of the term "use and occupation" in such a paper,—one merely dealing with real estate for a short term, creating at most an estate for years. In a correct legal sense the very idea of use and occupation of realty for less than a life, distinct from the legal title thereof, is that the holder of the latter is the landlord and the grantee of the use a mere tenant, with or without a specific agreement as to a rent charge. The De Pere Co. v. Reymen, 65 Wis. 271, 22 N. W. 761; 27 N. W. 155; 18 Am. & Eng. Ency. Law (2d ed.) 263, 469; 2 Taylor, Landl. & Tenant, § 236; 2 Woodf. Landl. & Tenant, p. 538. If there could be any manner of doubt as to whether the term "use and occupation" was used in that sense, that doubt would be easily solved by the fact appearing upon the face of the paper that the arrangement between the parties thereto was only for about 14 months, a time so short as to be entirely inconsistent with the idea that plaintiff intended to put her life estate into the venture. * * *

§ 67.—The Controlling Consideration.

WALKER ET AL. v. DOUGLAS ET AL.

1873. 70 Ill. 445.

A CONTRACT, under seal, recited that the party of the first part "has this day sold" to the party of the second part certain property, etc., which was to be paid for in instalments, extending through a period of eighteen months. It also contained a clause by which the party of the first part bound himself, in a penal sum equal to double the amount of the purchase money, to convey the property upon payment of all of the instalments; and a further clause, that the party of the second part might, at the expiration of two years, elect whether he would affirm the contract, and if he should determine to rescind it, the party of the first part should take back the property, and refund whatever had been paid, with interest from the time of payment.

SCHOLFIELD, J.— * * * A preliminary question relates to the construction of the contract. It is contended by complainants that the word, "sold," being used instead of the words, "agreed to sell," manifests an intention to vest a present equitable title; that the word, "sold," is made by our statute a word not only of conveyance, but of warranty also, and that Douglas could not, therefore, forfeit the contract, but his only remedy was to enforce a vendor's lien.

A familiar elementary principle of construction applicable here is, that it is the duty of the court "to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and where the intention of the parties to the contract is sufficiently apparent, effect must be given to it in that sense, though violence be done thereby to its words; for greater regard is to be had to the clear intent of the parties, than to any particular words which they may have used in the expression of their intent." 1 Chitty on Conts. (4 Am. ed.) 104-5.

In Broadwell v. Broadwell, 1 Gilm. (Ill.) 600, it was said: "In applications for specific performance of agreements, it is immaterial what the form of the instrument is—whether it is a covenant, or a penal bond with a condition to do the thing. The great and leading inquiry is, what did the parties expect would be done?" See, also, Fitzpatrick v. Beatty, ib. 468.

We think there is no difficulty here in ascertaining, from the language used, that the parties did not intend or understand that the contract was in anywise executed, but that it was purely executory, and that no present estate in the property, either legal or equitable, was intended to be vested in Walker.

Douglas bound himself to Walker, in the penal sum of $16,000

for the performance of the conditions of the agreement. One of those conditions is in these words: "Now, it is expressly agreed, *that, upon payment* of each of said notes according to their tenor respectively, *the said Douglas is to convey* to said Walker a good and sufficient title to said premises, with covenants of warranty in respect to title, defending the same against the whole world." What language could have been employed that would have more clearly expressed the idea that title was to be conveyed upon the performance of a future condition? That this form of expression clearly negatives all presumptions that any title was then vested, would seem to admit of no argument. Moreover, by another condition, Walker is allowed two years from the date of the agreement in which to determine whether he will elect to affirm or rescind the purchase of the property; and should he elect to rescind, the payments made are to be treated as in the nature of loans of money, which Douglas is bound to repay, with ten per cent interest. Manifestly, Walker was not bound to take this property until he exercised his right of electing whether he would have it or not; and it would be absurd to say that Douglas was bound, when Walker was not. In the absence of evidence showing that Walker had waived this right of election, there was not, therefore, an *absolute agreement* even to sell and *convey, the property in the future,* much less in the present. * * *

DAVIS v. BOARDMAN.

1815. 12 Mass. 80.

AN insurance was effected for $3,000 on a ship, and $1,000 on her cargo, from the United States to Ireland. At the foot of the policy was this memorandum: "Should this vessel and cargo be insured in England, this policy is to be cancelled," etc. Insurance was made in England, by the plaintiff's agent there, on the vessel only, and not on the cargo.

JACKSON, J.—The principal question in this case turns upon the construction of the memorandum at the foot of the policy declared on. It seems impossible to doubt as to the intention of the parties in making it. The plaintiff had sent orders to London to effect insurance there on the property in question, or on some part of it; but, it being necessarily uncertain whether those orders would be received and be executed by his agent in London, before intelligence of the safe arrival of the vessel, or of a loss, should reach that place, he wished to have conditional insurance made, to take effect in that event. He intended to be insured here, only to the extent of what he should fail to get insured in England. He disclosed these views

to the insurers here, and upon that representation this policy was effected.

But the event, which he intended to guard against, has not occurred. His instructions did reach his correspondent in London, and insurance was seasonably effected there, and did attach, according to the terms of the memorandum. If, then, the defendant is not discharged, it is because the parties have failed, from want of care or skill, to express what they most unquestionably intended.

The plaintiff, however, contends, that, by the terms of the memorandum, this policy was to be void only in case the vessel and cargo should be insured in England; and that, although the vessel appears to have been fully insured there, yet, there having been no insurance on the cargo, the condition has not happened, and this policy is effectual for the whole.

It is not uncommon, in papers written without much attention to technical and grammatical rules, to find *and* used for *or*, and *or* for *and*. (Rees v. Abbot, Cowp. 832.) In this case neither word alone would have clearly expressed the intent of the parties. They intended, that, if vessel and cargo, or either of them, should be insured in England, this policy should attach only on what should remain uninsured by such policy effected in England.

It is the duty of the Court, after having ascertained the meaning of the parties to a contract, to give it full effect, so far as may be consistent with the principles of the law.

The construction which we have adopted in the present instance, and which seems forced upon us by the nature and circumstances of the case, is confirmed by the legal principles applicable to the contract of insurance. A policy embracing two distinct subjects of insurance is, to many purposes, considered as two distinct policies. (Marsh. B. 1, c. 14, § 3.) Here is one insurance for $3,000 on the ship, and another for $1,000 on the cargo. The intent and effect of the memorandum is, that, if the ship be insured in England, this insurance on the ship is to be void; and, if the cargo be insured in England, the insurance made here on the cargo is to be void. *Reddendo singula singulis,* the memorandum is coextensive with the policy; and the condition which is to annul the contract is applicable to both or either of its parts, according to the event. * * *

We are entirely satisfied that the insurance, so far as respects the ship, is annulled and defeated by the memorandum, and by the events which have occurred; and the insurance on the cargo is effectual, and the contract in that respect in full force against the defendant. * * *

GRAY v. CLARK ET AL.

1839. 11 Vt. 583.

LAND was described in a mortgage as follows: "All that part of lot No. three in the fifth range of lots in said town, meaning to convey all that part of said lot that Luther Hunt deeded to me this day, excepting seventeen acres lying in the southeast corner of said lot, also including one quarter of an acre which James English deeded to Daniel Wilson." The question in controversy was this: Did the mortgage cover the quarter of an acre last described? The Court held that it did.

REDFIELD, J.— * * * If we adopt the rule, *ut res magis valeat quam pereat,* we must consider this as forming a part of the exception, for as the whole estate had already been described, it would not enlarge, nor in any way render more certain, the grant, but would enlarge the exception. But this maxim in regard to the construction of deeds is but one among the very great number which the sages of the law have left us. The great object, and, indeed, the only foundation of all rules of construction of contracts, is, to come at the intention of the parties. And any rule which leads us aside of this grand object, is to be disregarded. In the present case, from the general nature and object of the transaction and the common course of business, there can be little doubt of the intention of the parties to include the buildings, which constituted the principal value of the purchase, in the mortgage, which was executed to secure the purchase money. * * * We ought not, therefore, to adopt a construction which will defeat the obvious intention of the parties, and produce a result which it is highly improbable, perhaps absurd, to suppose they contemplated. This view is in accordance with established rules of construction. Cholmondeley v. Clinton, 2 B. & Ald. 625; Hassell v. Long, 2 M. & S. 363.

It has been repeatedly said that in the interpretation of contracts, a nice grammatical construction is not always to be regarded. Cromwell v. Grumsden, 1 Ld. Raym. 335, 2 Salk. 462; Fountain v. Guavers, 2 Show. 333, 7 Peterds. Ab. 139. Hence we are under no necessity of referring the word "including" to the next immediate antecedent "excepting." The term "including" may have reference to the deed, as well as the exception. And, it is evident, the most natural and obvious import of the word is, "including" in the deed, and not in the exception. * * *

GEORGE ET AL. v. TATE.

1881. 102 U. S. 564.

IN this case a firm name was signed to an assignment of a firm demand, but only one member of the firm was named in the body of the instrument.

SWAYNE, J.— * * * The instrument referred to purports to be an assignment to Tate of the bond of the plaintiffs in error. It begins and proceeds:

"I, William Greene, in consideration of the sum of $8,509, to me, in hand paid by Samuel W. Tate, * * * do hereby assign to said Tate the within instrument, and all my interest in the covenants and agreements therein contained, * * * and I hereby assign and convey to and for the benefit of said Tate all my right and interest in a certain suit now pending, * * * wherein I, William Greene and J. J. Meyers are plaintiffs, and M. B. George & Bros. are defendants, etc."

The testatum clause is:

"Witness my hand and seal this 1st day of November, A. D., 1872.

MYERS & GREENE,
By WM. GREENE."

It was in proof that the firm of Myers & Greene were largely indebted to Tate. He applied to Myers for payment. Myers said they had a claim against George & Brothers then in suit. He requested Tate to "go up and see Billy Greene," and added, "he will let you have the claim against George & Bros." Tate went to Greene, and Greene had the instrument in question drawn, and after its execution delivered it to Tate. Greene further agreed that the judgment in the pending suit should be assigned to Tate as soon as it was recovered.

Tate subsequently saw Myers and showed him the assignment. He said it was "all right," and Tate thereupon gave up to him the notes of Myers & Greene to the amount of the claim against George & Bros.

The bond was given to prevent the execution of a writ of attachment issued for the seizure of the property of George & Bros., to secure the payment of any judgment Myers & Greene might recover against them. It was conditioned for the payment of such judgment.

Viewing the transaction in the light of this evidence, it cannot be doubted that it was the intention of both parties that the bond should be transferred to Tate, and we think that intent was made effectual. The difficulty, so far as there is any, has arisen from the unskillfulness of the draftsman of the instrument. The assignment could have been made by one of the partners, and he could have made it

by parol. Jones v. Guaranty & Indem. Co., 101 U. S. 622; Story, Part., sec. 101. The signature of the firm name shows that the instrument was intended to be the act of both partners, and effect must be given to it accordingly. This can be done upon settled legal principles and analogies.

If a promissory note be drawn "I promise to pay," etc., and is signed by more than one person, it is the joint and several note of all who sign it. Clerk v. Blackstock, 1 Holt 474; Hunt v. Adams, 5 Mass. 358; S. C., 6 Mass. 519.

If one party only be named as obligor in the body of a bond, and others sign it also, all are bound. In no other way can any effect be given to the signatures of those not so named. The intent is clear, and that is sufficient. Parks v. Brinkerhoff, 2 Hill (N. Y.) 663; Perkins v. Goodman, 21 Barb. (N. Y.) 218. * * *

OSBORN v. FARWELL.

1877. 87 Ill. 89.

DICKEY, J.—Appellee, being the owner of a building in Chicago, called the "Arcade Building," let a part of the same to the United States for offices, court rooms, etc., and having permission to let the fifth floor to other tenants, subject to the control of the officers of the government as to the character of the occupants, the mode of occupancy, and subject to the right of the government to require the fifth floor to be vacated at any time.

On this condition appellee leased the fifth floor to Darling, on the 12th of August, 1873, by a lease, to run until September 20, 1876, at the rate of $2,400 per annum, and accepted, in payment of the rent for the whole term, the conveyance to him by Darling of certain lands, among which were certain lands in Dunklin County, Missouri, which were taken at the price of $5,700.

The lease contained the following: "If said Darling shall be required by the United States government to leave and vacate said premises before the termination of this lease, a proportionate allowance of rent shall be made to said Darling by said Farwell for the time his occupancy of said premises shall be abridged from such cause. And in case said premises shall be destroyed by fire, so as to be rendered untenantable, a proportionate allowance of rent shall be made to said Darling by said Farwell for the time said premises shall thus remain untenantable; and such allowance may be paid by said Farwell in said lands in Dunklin county, at the same price paid by Farwell, * * * at the election of said Farwell."

Darling assigned this lease to Osborn, the appellant, who occupied

this fifth floor until some time in July, 1874, when, upon the demand of the United States government, he was required to leave and vacate the premises. Having done so, he became, under the lease and assignment, entitled to a "proportionate allowance of the rent for the time his occupancy of the premises" was abridged.

The only question submitted to this court relates to the kind of payment Farwell is bound to make. He insists that he has a right to make payment in the lands in Dunklin county, Missouri, while appellant demands payment in cash. The case must turn upon the construction of the words of the lease above quoted.

Appellant insists, because the description of the first contingency, upon which a proportionate allowance of rent was to be made, closes with a period, and the description of the second contingency begins with a capital letter, and is found in a second and separate sentence and in the same sentence in which the provision for payment in land is found, that the provision for payment in land applies only to the second contingency. In other words, if "his occupancy" had been "abridged" by the destruction of the premises by fire, Farwell would have had the right to make compensation in land, but having been abridged by the intervention of the United States, he is bound to make compensation in money.

This position can not be sustained. Punctuation in written contracts may sometimes shed light upon the meaning of the parties, but it must never be allowed to overturn what seems the plain meaning of the whole contract. It seems plain to us, that when the parties say, "such allowance may be paid * * * in land," they meant such allowance, from whichever cause arising, may be so paid. The very phrase, "a proportionate amount of rent shall be made," suggests the idea that the amount, when ascertained, is to be adjusted in some manner other than by full payment in cash. In our view, the words of this lease, notwithstanding the period, indicate that two contingencies are described, and upon the happening of either a proportionate allowance of rent was to be made to the tenant; and such allowance, whether growing out of the first or second contingency, was to be paid by Farwell, at his election, in land, as provided in the lease.

We hold that the circuit court gave the true construction to this clause of the lease, and the judgment will be affirmed.

Judgment affirmed.

§ 68.—Whole Contract to be Considered.

PLANO MFG. CO. v. ELLIS.

1888. 68 Mich. 101, 35 N. W. 841.

THE written contract, relied upon in this case, reads as follows: "We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Ream has his for, and the binder is to do good work, and give satisfaction; and, if not, the said Ellis is to pay for use of same.

CHAMPLIN, J.— * * * We are of the opinion that the circuit court erred in the construction which he placed upon the contract. A cardinal axiom, in the construction of written contracts, is that all the parts must be examined, and effect given to every word and phrase, if practicable. Vary v. Shea, 36 Mich. 388; Norris v. Showerman, Walk. Ch. 206, 2 Doug. (Mich.) 16; Paddock v. Pardee, 1 Mich. 421; Howell v. Richards, 11 East 643. The object is to arrive at the intention of the parties; and this is to be deduced from the language employed by them to express their intention. If the language employed is not free from doubt or uncertainty, resort may be had to the condition of the respective parties, the subject-matter of the contract, and the circumstances surrounding the transaction and connected with it, and everything except the contemporaneous and previous declarations of the parties, for the purpose of enabling the court to ascertain the intention of the parties. Mills v. Spencer, 3 Mich. 127, 136. Applying the above principles of construction to the writing introduced as the basis of plaintiff's claim, it is clear that the binder was not only to do good work, but it was to give satisfaction to defendant. Unless he was satisfied with the machine, although it did good work, he was not bound to purchase. The construction placed on the instrument by the circuit judge completely nullify the words "and give satisfaction." He construed them as synonymous with, to do satisfactory work, such as people knowing the quality of machines would be satisfied with; or, to use his own language, "this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to reasonable men using machinery."

This, certainly, is not the usual signification of the word, and there is nothing in the context, or in the subject-matter, which indicates that the word was used in any other than its ordinary meaning. The vendor had already agreed that the binder should "do good work," and if the learned judge had defined that phrase in the same way he did the word "satisfaction," it would have been applicable and proper. No one can read this writing, and give to the words their ordinary meaning, without understanding that something more was required than that the binder should do good work before defendant

was obliged to keep and pay for the machine. He was not obliged to do so, unless, also, it gave satisfaction to him. We may not take judicial notice of the fact, but we may well suppose that there is a choice between machines for reaping and binding that do good work. It may be that a machine which will do good, satisfactory work in reaping and binding, may, at the same time, have more side-draught than another, or it may be so geared as to require much more power to propel it than another, or its machinery may be complicated, and so constructed as to easily get out of repair, or require greater care and skill in operating it. All these things may not be impossible, or even improbable. How, then, can it be said that, although it does good work, nevertheless it may not give satisfaction? Or why should it be said, when the bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased if another reasonable or intelligent man is pleased with the work of such machine? There is another clause in the contract which has a bearing upon the question. It is stipulated that if the machine does not do good work, and give satisfaction, the said Ellis is to pay for the use of the same. It cannot be contended, with reason, that Ellis agreed to pay for the use of a machine that did not do good work. This clause implies that it may do good work, and yet not give satisfaction so that he will be willing to keep and pay for it. He agreed that, if it did not do good work, and give satisfaction he would pay for the use of the binder. He was entitled, under the agreement, to give the machine a thorough, practical trial; and then, if he was not satisfied with it, he was to pay for the use of it. This provision entitles the writing to a liberal construction in his favor. It shows that he had an option to accept or reject the binder, according as it gave him satisfaction or not. A proper construction of the contract clearly brings it within the first class of such contracts referred to in Machine Co. v. Smith, 50 Mich. 565-569, 15 N. W. 906, and is governed by the decision in that case.

The judgment must be reversed and a new trial granted.

BASSETT v. LAWRENCE.

1901. 193 Ill. 494, 61 N. E. 1098.

IN THIS case the question was whether an agreement cancelling a prior contract and adjusting matters growing out of the same, and providing that "from and after this date no indebtedness exists in favor of either of the parties" against the other, released a promissory note for money loaned, where the loan did not grow out of the cancelled contract and was not mentioned in the release.

CARTER, J.—The ultimate question in this case is, was the indebtedness created by the note sued on included in the agreement and

release of January 1, 1896? There can be no doubt that the court decided correctly in refusing to instruct the jury that it was so included, or, which was, in effect, the same thing, to instruct the jury to find a verdict for the defendant. We are of the opinion that the agreement of January 1, 1896, cancelling the original contract and releasing each of the parties therefrom, does not include the indebtedness evidenced by the note sued on. The law is, that "general words of release will be restrained in effect by the recitals contained in the instrument as applied to the subject-matter; and this is true at law as well as in equity." Todd v. Mitchell, 168 Ill. 199, and cases there cited; Lyall v. Edwards, 6 H. & N. 336; Addison on Contracts, 1223; Hazelgrove v. House, 6 B. & S. 975; Blair v. Chicago and Alton Railroad Co., 89 Mo. 383; Paylor v. Hormishan, 4 M. & S. 423; Lyman v. Clark, 9 Mass. 235; Rich v. Lord, 18 Pick. (Mass.) 322.

The provision in the instrument which appellant contends releases him from all liability on the note is this: "It is further agreed that from and after this date no indebtedness exists in favor of either of said parties, T. F. Lawrence or O. P. Bassett, against the other." All the recitals and all prior provisions of this contract were by their terms limited to matters involved in the contract of December, 1889, (that contract being referred to as "the within contract,") and applying the rule of construction to the clause above set forth, the indebtedness for borrowed money evidenced by the note was not included in the release when this release was executed. Lawrence had paid all of the installments of purchase money due to that time, but by the original contract nearly as many more would remain to be paid. It is not clear that Bassett owed him anything outside of the note; but be that as it may, the agreement that "from and after this date no indebtedness exists in favor of either of said parties," must, in accordance with well settled rules, be held to mean that no indebtedness involved in or created by or growing out of said contract should thereafter exist from either of said parties to the other.

The agreement of January 1, 1896, was a cancellation of the prior contract and an adjustment of matters involved in and a release of indebtedness created by or growing out of it, and of no other matter whatever. * * *

MONMOUTH PARK ASS'N v. WALLIS IRON WORKS.

1893. 55 N. J. L. 132, 26 Atl. 140.

ACTION on a contract to complete a grand-stand for a race course by a designated day. Judgment for plaintiff. Writ of error.

DIXON, J.—The first exception to be considered took its rise from the fact that the structure was not completed within the time limited

by the contract, nor until 94 days after the expiration of a month's extension of that time. The defendant claimed a deduction or set-off of $100 for each day's delay. The plaintiff met this claim by insisting that the clause in the contract mentioning the $100 per day is unintelligible, and therefore nugatory, because in its opening line it reads: "In case the said party of the first part shall to fully and entirely," etc., omitting any effective verb. We agree, however, with the trial judge, in thinking that the context shows the verb which should be supplied. It makes the $100 payable for each day that "the party of the first part shall be in default." This plainly indicates the verb "fail" as the omitted word, to be supplied as an equivalent for the expression, "be in default." The right of a court of law to read an instrument according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the instrument, is sufficiently vindicated by the decision of this court in Sisson v. Donnelly, 36 N. J. Law 432. See, also, Burchell v. Clark, 2 C. P. Div. 88. * * *

RICHMOND v. WOODARD.

1860. 32 Vt. 833.

PIERPOINT, J.—This case stands upon a demurrer to the plaintiff's declaration, based upon an alleged defect in the condition of the bond declared upon. The bond itself is set out upon the record; of course no question arises as to the admissibility of evidence to explain any ambiguity that may appear upon the face of the instrument. The question is one of construction alone, and to be determined solely by the light afforded by the instrument itself.

In construing written instruments, the first point to be ascertained, as a guide to its meaning, is, what was the intention of the parties; what object did they intend to accomplish when they made the instrument. When that is ascertained it is the duty of the court so to construe the contract as to effectuate that intention, provided it can be done without violating the established rules of law on the subject.

What then was the intention of these parties in making the instrument declared upon. It appears upon the face of the instrument that the plaintiff, Lorenzo Richmond, was the sheriff of Windsor county, and the bond is taken to him, describing him in his official capacity. It further appears, that one of the defendants, Harvey H. Woodard, who is the principal in the bond, had been appointed by the plaintiff a deputy sheriff, for said Windsor county. The condition provides that the said Richmond, sheriff as aforesaid, is to be saved harmless from all damage, risk, etc., in consequence of neglect,

misconduct, etc., in matters appertaining to said office of sheriff, and in that event the bond to be void. On this state of facts, who was it that the parties intended should save the plaintiff harmless, and from what, in order to discharge the obligation of this bond. There seems to be but one rational answer to this question, and that is, that Harvey H. Woodard, was to save the plaintiff harmless from all said Woodard's neglect, or misconduct, in matters appertaining to the office of sheriff.

No question, we think, can be made, but what that was the intent and purpose of the parties.

The condition reads as follows: "Now if the said Minot Wheeler shall, at all times, save the said Richmond harmless," etc. We think the insertion of the name of Minot Wheeler, in this connection was clearly a mistake on the part of the person who drafted the bond, and that the error was not noticed when the bond was executed. His name does not appear in any other part of the instrument, and has no appropriate place where it is. The person who drafted the instrument shows his intention to insert the name of some person whose name had before been used in the instrument, by preceding the name with the words "the said," etc.

As we have already said, the insertion of the name of Minot Wheeler in this bond, was clearly a mistake as evidence by the bond itself, and in this respect the bond is not in accordance with the clear intention of the parties, and to make it so requires that it should be construed the same as though the name of Harvey H. Woodard occupied the place now occupied by that of Minot Wheeler.

Can this court, without violating the established rules of construction, so construe it?

Judge Parsons, in treating of the construction of contracts, lays down the following: "An inaccurate description, and even a wrong name of a person, will not necessarily defeat an instrument. But it is said that an error like this cannot be corrected by construction, unless there is enough besides in the instrument to identify the person, and thus supply the means of making the correction. That is, taking the whole instrument together, there must be a reasonable certainty as to the person. It is also said that only those cases fall within the rule in which the description, so far as it is false, applies to no person, and so far as it is true applies only to one. But even if the name, or description when erroneous, apply to a wrong person, we think the law would permit a correction of the error by construction, when the instrument, as a whole, showed certainly that it was an error, and also showed, with equal certainty, how the error might and should be corrected." If this rule as laid down is law, it removes all doubt as to the power of the court to correct this error by construction, for it will be conceded that the case before us comes clearly within the principle advanced. * * *

§ 69.—In What Sense the Words are to be Understood.

STETTAUER ET AL. v. HAMLIN.

1881. 97 Ill. 312.

MULKEY, J.—* * * It is a familiar rule, of constant application, that courts give effect to all written instruments according to the ordinary popular meaning of the terms employed, when nothing appears to show they were used in a different sense, and no unreasonable or absurd consequences will result from doing so.

Applying the rule in question to the operative words of the deed under consideration, we are unable to discover any just ground for a difference of opinion with respect to their import.

The language used seems to be unusually specific and clear. The phrase, "fixtures, of every description, attached to said building, in said buildings and belonging to the same," does not indicate or describe two classes of fixtures, one attached and the other not attached to the building, as is supposed by appellants' counsel. If it had been intended to include both kinds of fixtures—as it is conceded there were but two—there was clearly no necessity or propriety in using the qualifying clause, "attached to said buildings," at all; for the two classes were already included and amply designated by the expression, "fixtures of every description."

On the contrary, but one class of fixtures is described by the phrase in question, namely, fixtures attached to the building—and consequently that class of fixtures, only, passed by the conveyance. The clause, "attached to the buildings," is clearly a limitation on the one which precedes it, and when taken together they manifestly mean the same thing as is written, "fixtures of every description which are attached to the buildings."

The record shows, that there was a variety of articles of the kind or class intended to be conveyed, namely: Such as were attached to the building; and the expression, "of every description," was doubtless used with reference to the variety of articles belonging to that class.

The expression, "in the buildings" simply points out the locality of the attached fixtures; and the clause, "belonging to the same," expressly excludes from the operation of the conveyance all fixtures not procured for or used in connection with the building as a business house.

It is true, as stated by counsel, that the term, "fixtures," is sometimes applied to articles not attached to the realty; yet, that fact can be of no consequence in arriving at its meaning, where the instrument in which it occurs, in express terms, speaks only of "fixtures

attached" to a building. In such case there is really no room for construction.

Where, as in this case, the instrument speaks of fixtures attached to a particular building, to say that articles not attached are intended, is but to contradict the express terms of the instrument, and not to construe it. * * *

RASTETTER v. REYNOLDS ET AL.

1903. 160 Ind. 133, 66 N. E. 612.

DEFENDANT ordered of plaintiffs certain elm strips "1¼ x 1 x 7 feet long," and the order was accepted. By usage among lumber dealers in that locality, strips such as those ordered were sawed in the green, the dimensions being determined at that time, and with the understanding that they would shrink and be smaller when dried.

MONKS, J.— * * * Appellant insists that there was a contract between the parties in this case which was entirely clear and free from ambiguities, not subject to be varied by parol proof of custom or usage alleged to have existed in such business, and that, therefore, it was not proper for the appellees in their complaint to allege, and by their evidence to prove, a usage intended to be explanatory of the language of appellant's order. Common terms, however, may, in a particular business or trade, acquire a peculiar and different signification from that generally given to them. It is perfectly well settled that, when parties enter into a contract with reference to a particular business or trade, they are presumed to have contracted with reference to the usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions are to be given that meaning which they have acquired in such business by common usage, unless, by the express terms of the contract, the usage is excluded or is inconsistent with the contract. Van Camp, etc., Co. v. Hartman, 126 Ind. 177, 179, 25 N. E. 901; Lyon v. Lenon, 106 Ind. 567, 572, 7 N. E. 311; Morningstar v. Cunningham, 110 Ind. 328, 334, 11 N. E. 593, 59 Am. Rep. 211; Prather v. Ross, 17 Ind. 495; Hibler v. McCartney, 31 Ala. 501, 506; Lowe v. Lehman, 15 Ohio St. 179; Dwyer v. Brenham, 70 Tex. 30, 7 S. W. 598; Gunther v. Atwell, 19 Md. 157; First Nat. Bank v. Fiske, 133 Pa. St. 241, 242, 19 Atl. 554, 7 L. R. A. 209, 19 Am. St. 635, 27 Am. & Eng. Ency. of Law (1st ed.), pp. 809-815; Clark's Brown on Usages and Customs, §§ 41, 42; Lawson, Usages and Customs, §§ 17, 24; 1 Beach on Contracts, §§ 581, 747, 758; 2 Beach on Contracts, §1746.

It appears from the allegations of said fourth paragraph that said

strips were sawed in the green of the dimensions named in said order, and that if they had been delivered at that time they would have been of the proper size; that the delay in the delivery of said strips was caused by appellant's failure to send to appellee's mill a man to inspect and measure the same at the time they were sawed; that during the time of this delay the strips shrunk so that when delivered they were not of the dimensions named in the order. It is clear, therefore, that the usage is not set up in said paragraph to contradict or nullify the contract, but to explain and show what contract the parties made.

Contracts of the kind here involved may, on their face, seem clear, but in the particular instance, in connection with the business to which they pertain, be ambiguous. Thus, in Hibler v. McCartney, 31 Ala. 501, it was permitted to explain that the expression "dangers of the river," used in a bill of lading, really, by the usages of business, included also dangers by fire. In Soutier v. Kellerman, 18 Mo. 509, the contract called for the sale of shingles at a certain price per thousand, a perfectly clear expression ordinarily and abstractly considered; yet it was held competent to show that, by the usage of the business, two bunches of shingles of certain dimensions, regardless of the number of shingles actually contained in the bunches, constituted a thousand, and that a delivery upon such a basis was within the terms of the contract. In the English case of Smith v. Wilson, 3 Barn. & Adol, 728, the contract of sale called for 1,000 rabbits, yet the purchaser was permitted to insist upon a delivery of 1,200 rabbits, in virtue of a usage of that trade by which 1,000 rabbits had come to mean 100 dozen, or 1,200 rabbits. So, in a contract for the furnishing and laying of bricks at so much per thousand, it was permitted to show that the expression "per thousand" in that business really meant a portion of the completed building, of certain dimensions, without reference to the actual number of bricks therein contained. Lowe v. Lehman, 15 Ohio St. 179. See also, Humphreysville, etc., Co. v. Vermont, etc., Co., 33 Vt. 92; Dwyer v. Brenham, 70 Tex. 30, 7 S. W. 598; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Gunther v. Atwell, 19 Md. 157; Lawrence v. Gallagher, 42 N. Y. Super. Ct. 309. In Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407, a written contract provided that the plastering of a house was to be done at a fixed price per square yard, and it was held competent to show that it was the usage of plasterers in that particular place to measure the full surface of the walls, without deductions for doors, windows, etc. In Barton v. McKelway, 22 N. J. Law 165, a contract for the delivery of certain trees from a nursery provided that the trees were to be not less than one foot high. The dispute was as to the measurement, and evidence was held competent of a usage in the trade only to the top of the ripe, hard wood, and not to the top of the tree. See also, Hinton v.

Locke, 5 Hill (N. Y.) 437; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Ford v. Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297; Morningstar v. Cunningham, 110 Ind. 328, 334, 335, 11 N. E. 593, 59 Am. Rep. 211.

It is objected that said fourth paragraph does not show that the usage had existed for any considerable length of time. It is not necessary that a usage should have existed from time immemorial, or that it should have existed for any considerable length of time; it is sufficient if it were known to the parties at the time they entered into the contract. Lawson, Usages & Customs, § 17, pp. 40, 41; Clark on Cont., pp. 583, 584; Morningstar v. Cunningham, 110 Ind. 328, 334, 11 N. E. 593, 59 Am. Rep. 211; Chateaugay Iron Co. v. Blake, 144 U. S. 476, 486; Patterson v. Crowther, 70 Md. 124, 130, 16 Atl. 531; Thompson v. Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

It is directly alleged in said fourth paragraph "that this custom was well known to both the plaintiffs and said Louis Rastetter & Son," and that the dealings between the parties were had with reference to this custom. It is evident, therefore, that the court did not err in overruling the motion to strike out. For these reasons, also, said paragraph was sufficient, as against appellant's demurrer for want of facts. * * *

Judgment affirmed.

GILBERT & CO. v. McGINNIS ET AL.

1885. 114 Ill. 28, 28 N. E. 382.

MULKEY, J.—On the 16th of February, 1881, Patrick McGinnis, the appellee, sold to the appellants, Herbet S. Gilbert & Co., seven thousand bushels of corn at thirty-nine cents per bushel, to be delivered in the months of August and September following. As a part of the same agreement the appellants promised to make advances on the contract to appellee of what money he might, from time to time, require. A short time after the making of this agreement, appellee called on the appellants, at their business house in Ottawa, and requested an advance on the contract, as per agreement. The clerk in charge of their business told him he could have the money, and commenced writing a note for the amount, whereupon appellee stated to the clerk he would not sign a note, remarking, in effect, that if he wanted to obtain money in that way he could get it from the bank. Appellants refused to make the required advance unless appellee would give his note for the amount. This he declined to do, and informed the clerk at the time he would not let appellants have the corn. The corn not having been delivered within

the time specified in the agreement, the appellants, on the 3d day of October, 1881, commenced an action of assumpsit, against appellee, in the circuit court of LaSalle county, to recover damages for the non-delivery of the corn, which resulted in a judgment in favor of the defendant, for costs. This judgment having been affirmed by the appellate court for the Second district, the plaintiffs appealed to this court.

On the trial the plaintiffs offered to show there was a general custom among grain merchants to take notes from the seller for the amount of advances made under contracts for the sale of grain, like the one in question. They also proposed to prove that on previous occasions there had been contracts and dealings similar in character to the one sued upon, and that the manner of dealing between the parties was, when an advance was made, memoranda or notes should be taken for the money advanced. The court declined to admit evidence to the jury in support of either of these positions, and the ruling of the court in this respect presents the only question for determination. The same question is raised by certain refused instructions asked on behalf of the appellants.

The rule is well recognized that where a commercial contract is in any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intentions of the parties, and to aid the court in arriving at its true construction, will be admissible in evidence. Such evidence is not only admissible for the purpose of explaining the terms of a contract, but also for the purpose of ingrafting, as it were, new terms into it, subject, however, to the qualification that such new terms are not expressly or impliedly excluded by the express agreement. (1 Smith's Leading Cases 307, *et seq.*) To have this effect, however, the usage must be reasonable, and not in conflict with any general rule of law. (Macy et al. v. Wheeling Ins. Co., 9 Met. (Mass.) 354.)

The proof offered in this case was clearly not for the purpose of explaining any ambiguity in the contract, or for the purpose of showing that some particular word or phrase in it is used out of its ordinary signification. No claim of this kind is made. It is conceded by both parties that appellants were to make advances—that is, let appellee have money, from time to time, as he might need it, under the contract. So far there is no controversy. But appellants contend that a custom or usage prevailed, not adverted to in the express agreement, which required the appellee to give to them his note upon receiving any such advances. The usage here sought to be shown, it is clear, was for the purpose of aiding a stipulation on the part of appellee which, it is conceded, is not found in the express agreement. This, as we have already seen, may sometimes be done; but whether

it could be done in this particular case depends upon whether the stipulation thus to be added is inconsistent or in conflict with that part of the agreement which is expressed, and about which there is no controversy. We are clearly of opinion that it is, and that the trial court therefore ruled properly in excluding the evidence and in refusing the instructions complained of.

An advance or payment of money on a contract of sale, without doubt, is altogether a different thing from that of obtaining money from the purchaser on the seller's own note. The legal effect of the transaction in the first case is to extinguish, *pro tanto*, the seller's claim and the purchaser's corresponding liability. In the second, no part of either is extinguished. Instead of collecting something on his corn, as provided by the agreement, the seller is offered a loan of money on his individual note, which would be a complete change of the legal relations of the parties. Whereas the seller was, before, a mere creditor of the purchaser, he at once, upon giving such a note, becomes the debtor of the purchaser, and no part of the debt due him on account of the sale is thereby discharged. Thus it is seen the legal effect in the one case is practically the very opposite of what it is in the other, and might in many cases result in the grossest injustice. For instance, had appellee given his note for the required advance, the appellants might, the next hour thereafter, have transferred it to another for value, and appellee would have been compelled to pay it, whether he ever got a cent for his corn or not. This is apparent. That one will not be permitted to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself, will hardly be questioned. This is not only the universally received doctrine on the subject, but it has been often fully recognized by this court. Cadwell v. Meek, 17 Ill. 220; Bissell v. Ryan, 34 *id.* 566; Deshler v. Beers, 32 *id.* 368; Wilson v. Bauman, 80 *id.* 493. In the editor's note to Wigglesworth v. Dalleson, Smith's Leading Cases 309, it is said: "Evidence of usage, though sometimes admissible to add to or explain, is never to vary or to contradict, either expressly or by implication, the terms of a written instrument,"—citing in support of the proposition, Magie v. Atkinson, 2 M. & W. 442; Adams v. Worldley, 1 *id.* 374; Freeman v. Loeder, 11 A. & E. 589, and Gates v. Pym, 6 Taunt. 445. The rule here stated is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case.

It follows from what we have said, and the authorities cited, the judgment of the appellate court must be affirmed.

Judgment affirmed.

RICKERSON v. HARTFORD FIRE INS. CO.

1896. 149 N. Y. 307, 43 N. E. 856.

VANN, J.— * * * The secretary of another company was called by the defendant as an insurance expert, and asked: "Where there are two buildings on a single lot, one used as a dwelling and store, the other used for some manufacturing purpose, one on the front lot, and one on the rear, how would you describe in the policy the building situate in the front?" This was objected to by the plaintiff as incompetent, irrelevant, and immaterial, but the objection was overruled, an exception taken, and the witness answered, "Simply describe it, 'situate number so and so in the street or thoroughfare.'" He was then asked, "How would you describe the building situate in the rear?" and under objection and exception he answered, "Describe it as situate in the rear lot." The object of this evidence was to show that a custom prevailed in the insurance business as to the manner of describing certain kinds of property. The usage of a particular business, "when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of a contract, is deemed to form a part of the contract, and to enter into the intention of the parties." Walls v. Bailey, 49 N. Y. 464, 469. The custom, however, must be shown to have been known to the parties when the contract was made, or to have been so generally known as to raise a presumption that they had it in mind at that time. Howard v. Insurance Co., 109 Mass. 384, 389; Gabay v. Lloyd, 3 Barn. & C. 793; Bliven v. Screw Co., 23 How. (U. S.) 420, 431; Barnard v. Kellogg, 10 Wall. (U. S.) 383; May, Ins., § 179; Arnould, Ins. 65; Starkie, Ev. 637; 2 Pars. Cont. 541. No evidence was given to show that the alleged usage was general, or even that it prevailed in a particular locality, or that the plaintiff or his assignors had any knowledge of it. As the questions objected to did not call for what the witness had done, or had seen done, but what he would do, they were not competent to establish a custom. Usage is a matter of fact, not of opinion, and must be shown by those who have observed the method of transacting the particular kind of business as conducted by themselves and others. Mills v. Hallock, 2 Edw. Ch. 652; Haskins v. Warren, 115 Mass. 514, 535; Bank v. Swain, 29 Md. 483, 498; Gary v. Meagher, 33 Ala. 630; 2 Rice, Ev. § 349. But even on the assumption that a custom existed, neither the plaintiff nor his predecessors were bound by it, because it was not shown to have been generally known, or that it was known to either of them. As was said by this court in Harris v. Tumbridge, 83 N. Y. 92, 100, "a custom or usage which binds the parties to a contract does so only upon the principle either that they have knowledge of its existence or that it is so general that they must be supposed

to have contracted with reference to it." We think that the evidence above referred to was improperly received, and that the judgment appealed from should, therefore, be reversed, and a new trial granted.

Judgment reversed.

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§ 70.—Technical Words.

GAUCH v. ST. LOUIS M. L. INS. CO.

1878. 88 Ill. 251.

SCHOLFIELD, C. J.—Christian Gauch obtained a policy of insurance on his life, from the St. Louis Mutual Life Insurance Company, of $5,000, for the benefit of and payable to "his legal heirs or assigns." By his last will and testament, among other bequests, Gauch bequeathed this policy to his children. He died, leaving surviving him a widow and eight children. His widow renounced, in conformity with the provisions of the statute, the benefit of the bequests and devises made her by the will, and elected to take, in lieu thereof, her dower and legal share in the estate. Two-thirds of the amount due upon the policy were paid to the children of Gauch. The remaining third is claimed both by the widow and the children; and the insurance company filed its bill of interpleader to determine the rights of the respective claimants, and ascertain to whom this balance should be paid.

The court below decreed that the children were entitled to the entire amount called for by the policy, and, consequently, that the unpaid balance due on the policy should be paid to them; and from that decree this appeal is prosecuted by the widow.

Assuming, as is tacitly conceded by counsel for appellee, that the bequest of the policy, by the last will and testament of Gauch, did not operate as a valid assignment to the children, the question to be determined is, does the term "legal heirs," as used in the policy, include the widow? * * *

The word "heir" has a technical signification, and we must presume that, in the policy, the term "legal heirs" was used in its strict and primary sense, there being nothing in the context to show that it was used in any other sense. It was said in Richards v. Miller, 62 Ill. 417, "the word heir, when uncontrolled by the context, designates the person appointed by law to succeed to the real estate in question in case of intestacy;" referring to 2 Jarman on Wills 1, Jacobs says, "heir is he who succeeds, by descent, to lands, tenements and hereditaments, being an estate of inheritance." We know of no respectable authority, and venture there is none, holding that one entitled to dower or an interest in the nature of dower, or any allow-

ance of personal property only, because of the survivorship of the husband or wife, is held to be included within the legal definition of "heir." Nor is the distinction between the word "widow" and the word "heir" less marked in common parlance. No one, having children speaks of his wife, in contemplation of her survivorship, as his "heir;" but it is believed it is universal that she is referred to as "widow" and the children as "heirs."

There is, therefore, no reason, in our opinion, for holding that when Gauch had the words "legal heirs" inserted as the beneficiaries of the policy, he intended his wife. * * *

Decree affirmed.

BOWMAN v. LONG.

1878. 89 Ill. 19.

IN this case appellant for a consideration covenanted to warrant and defend the title of appellee in a town lot against the claims of all persons "except those of James Ewing and his legal representatives." Appellee claiming to have been evicted by judgment under paramount title, derived from Ewing, brought his action on this warranty. The court below held that the words 'legal representatives' did not include assignees or grantees. Appeal.

SCHOLFIELD, J.— * * * The term, "legal representatives," in its strict and literal acceptation, means executors or administrators, but it is frequently used in a different sense, even in statutes, as well as in wills, deeds, contracts, etc.; and it is, therefore, held that the question of intention is to be considered in its construction, "and that this is not to be gathered solely from the instrument itself, but, in part, from concomitant circumstances and the existing state of things, and the relative situation of the parties to be affected by it." Delaunay v. Burnett, 4 Gilm. (Ill.) 494; Phelps v. Smith, 15 Ill. 572; Warnecke v. Lembca, 71 *id.* 91. * * *

It is quite evident that if we shall say "his legal representatives," as used in this covenant of warranty, are to be taken, only, in their strictly primary legal signification, as meaning executors or administrators, they are nonsensical, and add nothing whatever to the preceding words; for by no legal possibility could the executors or administrators, simply as such, have an interest in the title that would enable them to recover possession of the lot through legal proceedings.

Assuming his title to be paramount, Ewing could evict Long, and, by will or deed, he could invest his devisees or assignees with his title, and this would enable them to do so, or, dying intestate, the law would invest his heirs with such title; but it is legally impossible

that any one else could, in right of Ewing's title, legally evict Long. * * *

In a certain sense, those who legally succeed to the title are, in fact, the legal representatives of the person from whom it is derived —that is, they legally succeed, and thus represent him as owner of the title; and we cannot, under the circumstances, doubt that this is the sense in which the term, "legal representatives," is here employed. * * *

Judgment reversed and cause remanded.

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§ 71.—Reference to the Subject-Matter and the Circumstances.

KENDALL v. KINGSLEY.

1876. 120 Mass. 94.

IN this case an assignment was executed August 31, of "all rents due and coming due to me until October 1" from the tenant of a certain estate, who paid his rents on the first day of each month. The question was whether the assignment included the rents which fell due on October 1.

GRAY, C. J.— * * * It may be assumed, as argued for the plaintiff, that the preposition "until," like "from," or "between," generally excludes the day to which it relates. Nichols v. Ramsel, 2 Mod. 280; Wicker v. Morris, Cas. Temp. Hardw. 116; Bemis v. Leonard, 118 Mass. 502; Atkins v. Boylston Ins. Co., 5 Met. (Mass.) 439. But such general rules of construction must yield to the intention of the parties, apparent upon the face of the whole instrument, as applied to the subject matter; and it is manifest that an assignment, executed on the 31st of August, of "all rents due and coming due to me until October 1, 1874," from the tenants of a certain estate, who pay their rents on the first day of each month, is not intended to be limited to the rents falling due on the 1st of September, but includes those which fall due on the 1st of October. Anon. 3 Leon. 211; Rex v. Syderstone, Cald. 19; The King v. Stevens, 5 East 244, 256, 257; Isaacs v. Royal Ins. Co., L. R. 5 Ex. 296.

MARYS v. ANDERSON.

1855. 24 Pa. St. 272.

In this case there was a lease of land for one year from the first day of April, 1848. During the lease the land was sold by order of the Orphans' Court, and by the conditions of sale the deed was to be made on the 1st of April following; but it was delivered by the administrators on Saturday, the 31st of March. The question was whether the purchaser was entitled to the rent.

Knox, J.— * * * It is impossible to examine this case without clearly discerning the intention to prevent the rent in controversy from passing to the purchaser. The title to the premises by the conditions of sale was to be retained until the lease had expired, and the act of the administrators, in delivering the deed the day before it could have been legally demanded, can make no difference in the case. It is argued for the plaintiff in error that, at all events, he was entitled to his conveyance on the first day of April, and that, inasmuch as the rent was not due until the day after, he is the legal owner of it. This argument is based upon the supposition that the lease did not expire until the 1st of April, 1849, including the whole of that day; but this position cannot be sustained. The lease was from the 1st of April, 1848, for one year. The tenant took possession on the 1st day of April, 1848, and at the close of the 31st day of March he had occupied the premises for an entire year. The 1st day of April, 1849, was the commencement of another year, and on the morning of that day, at any moment after 12 o'clock of the preceding night, the rent was due and payable, for the term had then expired. * * * The parties to this transaction doubtless had in view the universal understanding of the country, that where one rents lands or tenements for a year, from the first day of April, the tenant has the right to enter on the day named, and that his term ceases on the last day of March ensuing. Any other construction would not only do violence to the customs and habits of the people, but would, in the case before us, work manifest injustice, by giving to the plaintiff the income and profits of an estate for an entire year anterior to the commencement of his title. * * *

NASH v. TOWNE.

1886. 5 Wall. (U. S.) 689.

Clifford, J.— * * * Courts, in the construction of contracts, look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed,

and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. Add. Cont., 846; Shore v. Wilson, 9 Clark & Fin. 569; Barreda v. Silsbee, 21 How. (U. S.) 161. * * *

REED v. MERCHANTS' MUTUAL INS. CO.

1877. 95 U. S. 23.

ACTION on a policy of marine insurance.

BRADLEY, J.— * * * This case, upon the merits, depends solely upon the construction to be given to the clause in the policy: "the risk to be suspended while vessel is at Baker's Island loading;" and turns upon the point whether the clause means, while the vessel is at Baker's Island for the purpose of loading, or while it is at said Island actually loading. If it means the former, the Company is not liable, if the latter, it is liable.

A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject, Professor Greenleaf says: "The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what

their words express, but what is the meaning of the words they have used." 1 Greenl. Ev., sec. 277. Mr. Taylor uses language of similar purport. He says: "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible, of all the circumstances surrounding the author of the instrument." Taylor, Ev., sec. 1082. Again he says: "It may, and indeed it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it." Taylor, Ev., sec. 1085.

The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable. And, availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt as to the meaning and effect of the words which are presented for our consideration. * * *

In view of the circumstances it seems to us clear, that the meaning of the clause in question was, that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather, or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words "while vessel is at Baker's Island loading." It was the place, its exposure, its unfavorable moorage, which the insurance companies had to fear, and the risk of which they desired to avoid. The whole reason of the thing and the object in view point to the intent of protecting themselves whilst the vessel was in that exposed place for the purpose referred to, not merely to protect themselves whilst loading was actually going on. Her visit to the Island was only for the purpose of loading; as between the contracting parties, she had no right to be there for any other purpose; and, supposing that they intended that the risk should be suspended whilst she was there for that purpose, it would not be an unnatural form of expression to say, "the risk to be suspended while vessel is at Baker's Island loading." And we think that no violence is done to the language used,

to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties.

If we are right in this construction of the contract, there can be no uncertainty as to its effect upon the liability of the underwriters. The loss clearly accrued at a time when, by the terms of the policy, the risk was suspended. The ship sailed in ballast from Honolulu on or about the 7th of November, 1867, and arrived at Baker's Island on the afternoon of the 20th day of November, 1867. She came to her mooring in safety, and her sails were furled, shortly after which a heavy gale and heavy surf arose. The gale and surf continued with violence until the 3rd of December, 1867, when the ship parted her moorings, and was totally wrecked and lost. At no time after her arrival at Baker's Island was it possible to discharge ballast or receive cargo or to commence the progress of loading. The violence of the winds, current and waves, and their adverse course and direction prevented the ship from slipping her cables and getting to sea, or otherwise escaping the perils that surrounded her.

These facts are indisputable; and they show that, when the loss occurred, the vessel was at Baker's Island for the purpose of loading. That the process of loading had not actually commenced is of no consequence. The suspension of the risk commenced as soon as the vessel arrived at the Island, and was safely moored in her proper station for loading. * * *

McCOY v. FAHRNEY.

1899. 182 Ill. 60, 55 N. E. 61.

A TRUST deed in the nature of a post nuptial settlement was executed to secure a permanent support and maintenance for the use of the grantor's wife and children, and it directed the trustee, upon the death of the wife, to convey lands held by him to "all the children" of the wife. The issue of the wife by a second marriage claimed an interest in the premises.

BOGGS, J.—The ends to be attained by the interpretation or construction of the instrument is to ascertain the intention with which it was executed. That intention is declared in the premises of the deed to be to arrange to liquidate the debts of the said Samuel Ankeney "and to secure a permanent support and maintenance for the use of his wife and children." One of the purposes of the premises of the deed is to set forth the recitals which may be necessary to an explanation of the deed and its operation and the reason for ex-

ecuting it. (Black's Law Dic.; Anderson's Law Dic.; 5 Am. & Eng. Ency. of Law, 454.) Tested by this declaration of intention, the object of the grantor is unmistakable. His purpose was to devote the property affected by the deed, remaining after payment of his indebtedness, to the benefit of his wife and his children. Nor do we think this declared purpose is to be overcome by the subsequent requirement that upon the death of the said wife of the said grantor the trustee shall convey any lands held by him under the terms of the trust to "all the children of the said wife of the grantor." The true intent is to be gathered from the whole instrument, the separate parts being viewed in the light of the other parts. (Stout v. Whitney, 12 Ill. 218.) Inconsistencies are to be reconciled, if possible. A narrow and unreasonable construction, and which would work a result different from that manifestly intended, should not be adopted. (Dunlap v. Chicago, Milwaukee and St. Paul Railway Co., 151 Ill. 409.) "The language used may be enlarged or limited by the attendant circumstances and the objects had in view, and more regard is due to the real intention of the parties than to some particular word that may have been used in the expression of that intention." (Chicago, Madison and Northern Railroad Co. v. National Elevator Co., 153 Ill. 70.) "The experience of human affairs teaches courts that this intention is not to be sought merely in the apparent meaning of the language used, but this language may be enlarged or limited by reference to the circumstances surrounding the parties and the objects they evidently had in view." (Robinson v. Stow, 39 Ill. 568.) The same principle is announced in Street v. Chicago Wharfing Co., 157 Ill. 605. "Particular expressions will not control where the whole tenor or purpose of the instrument forbids a literal interpretation of the specific words." (Updike v. Tompkins, 100 Ill. 406.) "A rigid adherence to the letter often leads to erroneous results and misinterprets the meaning of the parties. Inconsistent clauses must be construed according to the subject matter and the motive, and the intention of the parties, as gathered from the whole instrument, must prevail over the strictness of the letter." (Beach on Modern Law of Contracts, sec. 708.) "Where two clauses, apparently repugnant, may be reconciled by any reasonable construction, or by regarding one as the qualification of the other, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent provisions." (Beach, sec. 718.) A written contract should be read as a whole. All its provisions are to be considered, and the general design must not be frustrated by allowing too much force to single words or clauses." (Beach, sec. 711.) * * *

Applying these rules of interpretation, we hold the trust deed under consideration was executed for the benefit of the then living children of Samuel Ankeney born of his then wife and such other children as should thereafter be born to them, and that the provi-

sion of the deed that upon the death of his said wife all of her children should share in the property affected by the trust deed, meant all of her children born to him. The wife, subsequently to the execution of the deed, obtained a divorce from the grantor and became the wife of one James B. McCoy, Sr. Children born to the wife by the second husband, though included within the literal meaning of the words, "all her children," were clearly not intended to be included within the meaning of the word "all" as employed by the maker of the instrument. The word "all" must, in view of the manifest intention of the grantor, be so limited in meaning as to refer only to all of the class of children intended to be benefited by the instrument. * * *

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§ 72.—Contract Restricted to its Evident Object.

HOFFMAN v. ÆTNA FIRE INS. CO.

1865. 32 N. Y. 405.

A POLICY of insurance on a stock of goods owned by a firm was conditioned to be void if the property should be sold. One of the firm sold his interest to the other. Action on the policy. Plaintiff had judgment below.

PORTER, J.—The weight of judicial authority in this State is against the doctrine that a policy issued to a firm is forfeited by a transfer of interest as between the parties assured. * * * But if the authorities were in equipoise, and the solution of the question depended on general reasoning and the application of settled and familiar principles of law, our conclusion would be in accordance with that of the court below.

The terms of the proviso are, that the policy shall be null and void, "if the said property shall be sold and conveyed." But these words are themselves vague and indeterminate. Are they to be understood in their largest sense without restriction or limitation? Clearly not; for we find on reference to other portions of the policy, that it was issued to the assured as merchants, and that it covered a stock of goods which it was their business to sell from day to day. Is the proviso applicable to the particular goods in the store at the date of the insurance? Such a construction would not only defeat the purpose of protecting a fluctuating stock, but it would annul the policy at once, for it would bring the first mercantile sale at the counter within the terms of the condition. What description of sales and conveyances then, did the parties contemplate when this provision was framed? Evidently such, and such only, as would transfer the proprietary interest of those with whom the insurers

contracted, to others with whom they had not consented to contract. They testified their confidence in each of the assured, by issuing to them the policy; but they did not choose to repose blind confidence in others who might succeed to the ownership. If the assured parted with the possession, as well as the title of the goods, the insurers knew of course that their liability would cease; but they were aware that in the exigencies incident to business, parties often retain the control, possession and apparent ownership of goods, after parting with all their title. To guard against such contingencies, they chose to provide for the forfeiture of the policy on the transfer of the title to others, even though the business should continue to be conducted by the assured.

It is suggested that the proviso may have been designed to secure the continuance in the firm, of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contractd with all; and the theory is rather fanciful than sound, that they may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them. Certainly nothing appears in the present case to indicate that all the assured were not equally worthy of confidence; and it is not to be presumed that in any case, underwriters would deliberately insure those whose integrity they had reason to distrust.

The policy in question having been issued to a mercantile firm, the company must be deemed to have had in view the fluctuating nature of a partnership business, and the changes of relative interest incident to that relation. These might be very important to the assured, though wholly immaterial to the risk. It is manifest that mere variations in the character and amounts of the interests of the assured as between themselves, did not constitute the mischief at which the proviso was aimed. If the applicants had originally objected to the form of the policy, on the ground that the effect of the clause might be to prevent the increase by a partner of his interest from one-fourth to one-third of the business, by purchase from the other members of the firm, the answer would undoubtedly have been that such a change was not within the operation or intent of the proviso. There is probably not a business firm in the State, which would accept at the usual rates, a policy declaring in terms that the premium should be forfeited and the insurance annulled, by a mere change of interest as between the partners. In this instance there is no such declaration; and an implication so repugnant to the evident design of the contract is not to be deduced from the unguarded use of general words, if they can be fairly limited to the appropriate and obvious sense in which they were employed by the parties.

The design of the provision was, not to interdict all sales, but only sales of proprietary interests by parties insured to parties not

insured. If the words were taken literally, a renewal of the policy would be required at the close of each day's sales. Indeterminate forms of expression in such a case are to be understood in a sense subservient to the general purposes of the contract. It is true that the language of the proviso against sales were not guarded by a special exclusion of changes of interest as between the assured, or of the sales of merchandise in the usual course of their business; but this was for the obvious reason that there was nothing in the tenor of the instrument to denote that the application of the clause to such a case was within the contemplation of the underwriters. "The matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense; and therefore the generality of the words used shall be restrained by the particular occasion." Powell Cont. 389; Van Hagen v. Van Rensselaer, 18 Johns. (N. Y.) 423. Thus, in an action on a life policy, containing a proviso that it should be void "in case the assured should die by his own hands," it was held by this court, that though in terms it embraced all cases of suicide, it could not properly be applied to self-destruction by a lunatic, as there was no reason to suppose that such a case was within the purpose of the clause or the contemplation of the parties. Breasted v. Farmers Loan and Trust Co., 8 N. Y. 299; 59 Am. Dec. 482. "All words," says Lord Bacon, "whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." Bacon's Law Maxims, Reg. 10.

Reading the proviso as it was read by the parties, it is easy to discern the purpose of its insertion. It was to protect the company from a continuing obligation to the assured, if the title and beneficial interest should pass to others, whom they might not be equally willing to trust. Words should not be taken in their broadest import, when they are equally appropriate in a sense limited to the object the parties had in view. 22 N. Y. 443; 14 *id.* 615, 622; 5 Duer (N. Y.) 340; 7 Hill (N. Y.) 255; 1 Duer Ins. 163, § 8. * * *

Judgment affirmed.

HAWKINS v. GREAT WESTERN R. R. CO.

1868. 17 Mich. 56.

CAMPBELL, J.—Plaintiff shipped certain horses over the railway of the defendants, under a contract which provided that the owners took all risks of loss, injury, damage, and other contingencies, "in loading, unloading, conveyance, and otherwise whether arising from the negligence, default, or misconduct, gross or culpable, or other-

wise, on the part of the railway company's servants, agents, or officers." * * *

The injury in this case occurred by reason of the bottom of the carriage giving way. Whether this was caused by a defect in the carriage, or by reason of some other neglect or fault in the course of the transit, does not distinctly appear, as the court below found that the company was not liable at all under this agreement. But, from the course of the argument, we infer that defective cars caused the damage. * * *

Unless some showing was made that the plaintiffs, with proper opportunities of observation, and with notice of their actual condition, assented to the use of the cars on which their horses were shipped, we think they were entitled to expect that reasonably proper cars would be furnished. While there is in one clause of the contract an exception of every default, the fair inference is, that this language was used as referring to defaults in the particulars specified in the previous articles, viz.: "loading, unloading, conveyance, and otherwise," and in matters of a like kind. The rule is usually applicable, that where no intention to the contrary appears, general words used after specific terms are to be confined to things *ejusdem generis* with the things previously specified: American Transportation Co. v. Moore, 5 Mich. 368. We think it would not occur to any one executing such a contract, that it had reference to any risks except such as were likely to arise from the nature of the freight, from delays, and from casualties and defaults occurring during the loading, transportation and unloading and delivery. It would not lead him to contemplate risks not incident to the ordinary transaction of business, and arising from negligence in no way likely to be incurred by a company using ordinary care in the management of its affairs. He would fairly be led to assume that the company, possessing the usual facilities for the carrying trade, of which cars are the first and indispensable means, merely sought exemption from risks incurred in the employment of those means.

If the cars in question were unfit for the purpose to which they were applied, and if that unfitness was of such a character as to imply fault in the company or their agents, for allowing them to be used, we think they are responsible for the damages which accrued from their use. As the case shows, there was evidence tending to show negligence, and as the negligence may have consisted and is assumed to have been, in the use of unfit cars, the case should have gone to the jury upon this point.

The judgment should be reversed, and a new trial granted.

§ 73.—Several Instruments Relating to the Same Subject-Matter.

SOLOMON SOLAR SALT CO. v. BARBER.

1897. 58 Kan. 419, 49 Pac. 524.

ACTION upon a promissory note dated Oct. 1st, 1892, which had a memorandum thereon that it "is made in accordance with and subject to the terms of a certain letter, dated Sept. 24, 1892," etc. There was not any evidence offered to explain the memorandum or show what terms and conditions it placed on the note. A demurrer to the evidence was overruled.

DOSTER, C. J.— * * * The memorandum written on the face of the note in this case made the letter referred to therein an integral part of the plaintiff's cause of action, and his failure to show what terms and conditions it placed on the note was fatal to his right of recovery. Memoranda such as this must be read as part of the note. 1 Daniel, Neg. Inst. §§ 149-156; Tied. Com. Paper, 41a. Two or more instruments executed at the same time, and relating to the same subject-matter, or executed at different times, and containing pertinent references to each other, constitute an entire contract, and must be construed together. Miller v. Edgerton, 38 Kan. 36, 15 Pac. 894. In this case the plaintiff rested upon the note alone. The court could know nothing about the terms and conditions which the letter attached to its payment. In order to maintain his action, the plaintiff should have introduced the whole of his contract in evidence, and should have shown by its different parts that he was entitled to recover. The court therefore erred in overruling the demurrer to the plaintiff's evidence, and because of this, its judgment must be reversed. * * *

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§ 74.—Contract Partly Written and Partly Printed.

HARPER v. ALBANY MUT. INS. CO.

1858. 17 N. Y. 194.

THE plaintiff was insured by the defendant against damage by fire to his printing and book materials, stock, paper, etc., contained in a certain building "privileged for a printing office, bindery and bookstore." The policy contained the following provision: "Camphene, spirit gas or burning fluid cannot be used in the building where insurance is effected unless permission for such use be indorsed in writing upon the policy, and is then to be charged an extra premium." In the conditions under the head of special rates

were classed book-binders, camphene on sale, printers of books and job printers, and the policy provided that if the premises should be applied or used for the purpose of carrying on any trade or vocation specified in the memorandum of special rates, unless as therein specially provided for or indorsed upon the policy in writing, the policy should cease. The fire was occasioned by the act of a plumber who, in making some repairs, accidentally threw a lighted match into a can containing a small quantity of camphene, used for cleaning the ink rollers used in printing.

Judgment for plaintiff. Appeal.

PRATT, J.—The judgment of the Supreme Court, I think, should be affirmed.

First. The exclusion of the use of camphene in the building where insurance is effected has reference to its use in lighting the premises. This is evident, I think, from the connection in which it is found with other articles used alone for that purpose. I know of no other use to which spirit gas and burning fluid are applicable, except for the purpose of lighting buildings. And that is the ordinary and more general use to which camphene itself is applied. The three articles for lighting buildings being thus placed together in the prohibition in connection with the consideration that such use is extremely hazardous, raises a strong presumption that its use for lighting alone was designed to be prohibited in this clause. But, taken in connection with the other provisions of the policy, the presumption becomes conclusive. In the class of special rates we find enumerated camphene on sale, without any such special prohibition; and in the same class is found printers of books and job printers, the very articles which the policy by its terms covers. Its use for cleaning rollers is clearly no more hazardous than keeping it for sale. I am satisfied, therefore, that it was not the mere presence of the article which was designed to be prohibited by the special clause in the policy, but its common, though hazardous, use for lighting buildings.

Second. But if that clause should be deemed to include any and every use of camphene, it would not avoid the policy. The insurance in this case is upon the stock in trade used in the business of printers of books and book-binders, and covers all such articles as are necessarily and ordinarily used in such business. The term "stock in trade" in a specified business, when used as matter of description in a policy of insurance, "includes, besides materials, every thing necessary for carrying on that business." (1 Phil. Ins., § 489.) They are just as clearly, therefore, embraced in the policy as if each article thus necessarily used was enumerated at length. (2 Hall (N. Y.) 589; Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383, affirmed in this court, December, 1854.) And the underwriters must be deemed to have been acquainted with the business, and with the materials ordinarily and necessarily used by the trade in pros-

ecuting it. In issuing the policy they must be deemed to have intended to include all such materials in the risk. In construing the policy, therefore, it is to be treated as if the article of camphene, for the use to which it was in fact applied, had been enumerated with the other articles covered by the policy. Thus considered, the rulings at the Circuit were clearly right.

A policy of insurance, like any other contract, should be construed so as to give it effect rather than to make it void. The company have received a premium adequate, it is presumed, to the risk which they have taken, and hence nothing but the most stern legal necessity should constrain the court to give it a construction which would nullify it and render it a mere deception instead of the protection which the parties to it designed.

It is a well-settled point that the written part of a policy shall always prevail over the printed part in cases of repugnancy. (2 Hall (N. Y.) 622.) The printed forms are very general in their terms. The prohibitions inserted therein are more particularly applicable to the ordinary and more common policies of insurance upon non-hazardous property, for the purpose of protecting the insurers against any increased hazard in consequence of a change of business or the use of any material more hazardous than that insured against. In much the greater portion of insurances there would be no repugnancy between the written and printed part of the policy, and effect, in such cases, should undoubtedly be given to every part of the instrument. Still the substance of the contract is the written part of the policy; and when the insurance is upon hazardous or extra-hazardous goods or trades, or upon those specified in the memorandum of special rates, these printed portions are not applicable, or at most only in a limited degree. Even in such case some effect may be given to these printed prohibitions. They would be held probably to prohibit a change of business from the one designated to another not designated, although the latter should be no more hazardous. In such cases they would not be entirely useless.

But when the insurance is directly upon the stock in trade, as for example in the business of manufacturing and sale of camphene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and indorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be preposterous. Indeed, presented in this form, no one would contend for such a proposition. And still that is substantially the point presented in this case. For if I am right in the proposition that if the article was necessarily and ordinarily used in the business it is included in the term "stock" used in the policy; it is as plainly within the risks assumed by the defendants as if written in at length. Upon the whole I think the rulings at the circuit were correct and the judgment must be affirmed.

§ 75.—Words Inconsistent With the Nature of the Contract.

STOCKTON v. TURNER.

1832. 7 J. J. Marsh. (Ky.) 192.

ROBERTSON, C. J.—This writ of error is prosecuted to reverse a judgment, by Turner, for the use of Triplet, against Stockton, in an action of covenant on an injunction bond, executed by Cox, as principal, and the said Stockton, as surety.

The first objection made in this court to the judgment is, that the circuit court erred in overruling a demurrer to the declaration. The only objection that has been, or can be made, with any semblance of plausibility, to the declaration, is that, in the condition of the bond, the stipulation is *literally* that, if the obligors "or either of them shall well and truly pay the debt aforesaid to the said Peter Cox," etc. The insertion of the name of Cox instead of that of Turner is a palpable mistake of such a character as not to affect the obligation; it is a mistake which the obligation itself, without the condition, and even the whole tenor and legal effect of the condition, without regard to the obligation, will correct. A nonsensical or repugnant condition will not affect an obligation, even though the entire condition be incongruous or uncertain; *a fortiori,* an uncertain or repugnant stipulation, or expression in a condition, consistent and certain in other respects, cannot change or materially affect the import and effect of the contract. Thus, if the condition of a bond be that if the obligor do *not* pay, the bond shall be void, the obligation will be understood to be single, or as if there had been no condition; "for when the condition recites a debt, and after lays an obligation not to pay it, it is in that repugnant and void." Ba. Ab. Cond. L., and Cooke v. Graham's administrators, 3 Cranch. (U. S.) 229. * * *

Wherefore, the bond in this case must be construed as a valid obligation to Turner, as described in the declaration; and as, in other respects, it is described according to its legal effect, the declaration is good. * * *

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§ 76.—Construction, if Possible, in Support of the Contract.

COYNE v. WEAVER.

1881. 84 N. Y. 386.

FINCH, J.—The plaintiff claims under a general assignment for the benefit of creditors, which the defendant insists is void on its face by reason of an unlawful authority conferred upon the assignee. The instrument contains a general grant and conveyance

of all the property and choses in action of the assignor, and empowers the assignee "to sell and dispose of the said real and personal estate, and to collect the said choses in action, with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." A literal and rigid construction of this language would justify the claim of the appellant that authority was given to compromise all debts due the assignor, as well those which were good for their entire amount, as those which were doubtful and precarious. If we were compelled to accept this interpretation, it would be our duty to declare the instrument void, for it would be an authority to waste the fund. But we are satisfied that it is not our duty to adopt the construction. It is difficult to conceive of any fraudulent motive or purpose on the part of the assignor which would be aided by such an authority. The consequent loss would be injurious to the assignor, and in no possible respect an advantage. The waste permitted would tend only to increase the balance of uncanceled debt remaining to hamper his action after the close of the trust. As sought to be construed it is literally an authority to waste the assets devoted by the assignor to the payment of his debts. Acted upon it could only injure both the creditors and the assignor and by no possibility benefit either. We should not accept such an interpretation unless compelled by plain and inflexible provisions. Two rules should guide us to the proper result. The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible, that is to be chosen which upholds and does not destroy the instrument. Townsend v. Stearns, 32 N. Y. 209; Brainerd v. Dunning, 30 *id.* 211; Campbell v. Woodworth, 24 *id.* 304; Benedict v. Huntington, 32 *id.* 219. It must be granted that the authority to compromise, given by the clause under consideration, relates by its terms to the choses in action generally transferred to the assignee. So far no distinction is made between the good and the doubtful assets. But the important words "where he shall deem it expedient to do so" qualify the general authority and limit it to either one or the other of two possible cases, according to our choice of one or the other of two possible constructions. Those qualifying words may mean, either that the assignee is at liberty to compromise any claim if he shall choose to do so, and behind his judgment nobody shall go, or that the assignee may compromise such claims as in the exercise of a sound discretion the interests of the trust require. We think the latter is the plain and proper construction. If it was necessary, in order to reach that interpretation, to be subtle and astute in our study of the language used, the quaint expression of Lord Hobart, cited with approval in Townsend v. Stearns, 32 N. Y. 215, would furnish our justification. A court may wrestle, if need be, with unwilling words to find the truth, or preserve a right which is

endangered. But any strain upon the language of the assignment is not necessary to our conclusion. We may so test the final and important phrase as to be certain of its meaning. Let us suppose that the assignee, acting under the authority we are discussing, had compromised a debt due the assignor by accepting one-half its amount, in a case where the debtor was perfectly good, and the whole sum could have been collected. Let us further suppose that on his accounting, the assignee, admitting all these facts, gave no other explanation than to plant himself upon the words of his authority, and declared that he was empowered to compromise where he deemed it expedient, and he did deem the compromise in question expedient, and therefore was entitled to protection. Is it to be presumed that any court would accept his construction of the authority conferred? The just and proper answer would be that he overestimated and misconstrued his power; that while he was given a discretion it was the discretion of a trustee, exercised in a proper case, under circumstances requiring it, and founded upon a just consideration of the needs of the fund committed to his care. The clause in question therefore must be held to have given to the assignee no arbitrary power to compromise where such action was neither necessary nor proper; but merely the discretion which the law recognizes to compromise doubtful and dangerous debts, in cases where the safety and interest of the fund demands such action; and that in such case only can he honestly "deem" a compromise "expedient," or be allowed to plead that authority as a protection. Thus understood, the language of the assignment is not open to the criticism bestowed upon it. It confers upon the assignee no unlawful or arbitrary power, and takes away from the creditors no just protection. It leaves the assignee liable to his negligence or misconduct if he makes a compromise where prudence or necessity do not require it, and the assignment therefore is not void. Dow v. Platner, 16 N. Y. 562; King v. Talbot, 40 *id.* 76; Chouteau v. Suydam, 21 *id.* 179; Ginther v. Richmond, 18 Hun (N. Y.) 234. * * *

GALE v. DEAN.

1858. 20 Ill. 320.

ACTION by appellee against appellant for damages for non-performance of an agreement to procure a deed to a piece of land from H. L. Tuller.

CATON, C. J.— * * * The measure of damages, in this case, was not the value of the land when the contract was made, but its

value at the time of the breach of that contract. Here no time was specified when the title from Tuller should be obtained. That portion of the contract on which the breach is assigned, is in these words: "the undersigned agreeing to obtain a deed by quit-claim, or otherwise, for one-half of said sub-lot 9, of H. L. Tuller, or such other party as may have the title to the half part of said lot formerly conveyed to said H. L. Tuller." The party did not claim to have the title himself, nor was he to make the conveyance. He agreed to procure the title from another, and without any specification of time within which it should be done. This gave to Gale a reasonable time within which to procure the conveyance. On the one side it was insisted, that the contract was broken after the expiration of a reasonable time, though both parties remained passive; while on the part of Dean it was insisted, that there could be no breach until he had requested Gale to perform and he had thereupon failed or refused to do so. We think neither of these positions is correct. We do not think that Gale, when he found he could not perform, was absolutely at the mercy of Dean, for the determination of the time when his liability should be fixed, and the measure of that liability determined. We think, after the expiration of a reasonable time, and after making all reasonable efforts to procure the conveyance from Tuller, without avail, that it was the right of Gale to notify Dean that he could not perform the contract, and thus, by his own affirmative act, create a breach and determine the time when the value of the land should be estimated, to establish the measure of damages which he was bound to pay, for the breach of the agreement. Until such notice was given, Dean had a right to believe that the contract would be performed, and to make improvements and enjoy the premises, in view of that supposition; but when he was notified that Gale could not perform the contract, by procuring the title he was no longer at liberty to act as if it was to be performed, and if he made further improvements, or did other acts, on the assumption that it would be performed, he did them in his own wrong, and could not use them to enhance his damages. This is in accordance with those principles of reason and justice which characterize the common law. We should never so construe a contract as to give one party an unfair or an unreasonable advantage over another, unless such was the manifest intention of the parties at the time it was made. We cannot presume here that it was the intention of either party, at the time the contract was made, in case Gale should be unable to procure the conveyance from Tuller, that it should be left entirely to Dean's discretion to postpone the time at which the value of the property should be taken for the purpose of fixing the measure of his damages, and that Gale should be obliged to stand by, dumb and powerless to act, and see the property rising in value, till it had arisen, as in this case, more than one thousand per cent., and then

be obliged to respond in damages to the full enhanced value of the property. When the contract was made, both parties knew that it was uncertain whether it would be possible for Gale to perform or not, and it is not reasonable to suppose that Gale thought he was receiving, or that Dean believed he was paying, a consideration adequate to such a contingent liability, in case it should be impossible for Gale to perform. It is one of the cherished objects of the law to maintain a reciprocity between the parties to contracts, wherever that can be done without doing violence to the language used. It is just as unreasonable, and there is just as great a want of reciprocity, in allowing Dean to hold on indefinitely, before fixing the time for declaring the breach, in case he saw the property appreciating in value, as there would be in allowing Gale to do the same thing in case he saw the value of the property depreciating. A just sense of reciprocity must require that either of the parties, after the lapse of a reasonable time, might declare a breach of the contract, if not performed; the one party by demanding performance and declaring it broken if it is not performed, and the other party by giving notice that he could not perform.

There was evidence tending to show such a determination and breach of the agreement by Gale, after the lapse of a reasonable time to perform, if that had been possible; and it was admitted on the trial that Gale had acted in good faith throughout, and it should have been left to the jury to say whether there had been such determination and breach by Gale. With a view to this, his counsel asked the court to instruct the jury as follows: "If the jury shall believe, from the evidence, that the witness, James H. Rees, had interviews with the defendant, at the instance of the plaintiff, in relation to the procuring of the quit-claim deed referred to in the contract given in evidence, then the statements made by the defendant to said Rees, at these interviews, and by him communicated to the plaintiff, are to be considered by the jury as having been made by the defendant to the plaintiff; and if the jury shall believe that the defendant did not act in bad faith, either in making the contract or in failing to perform the same, and that the plaintiff, in the manner above stated, was informed of defendant's inability to procure said quit-claim deed, then the measure of damages in this case will not exceed the value of the premises to be conveyed by said deed at the time when such communication was made to the defendant, with interest thereon at six per cent. per annum, to the present time." This instruction the court refused to give, but, on the contrary, instructed that the measure of damages was the value of the land at the time Dean demanded the performance and Gale's non-compliance with such demand; to which rulings exceptions were taken. In this

we think the court erred. The judgment must be reversed and the cause remanded.

Judgment reversed.

MINNESOTA LUMBER CO. v. WHITEBREAST COAL CO.

1896. 160 Ill. 85, 43 N. E. 774.

IN this case the principal question was whether a contract by the appellant for its "requirements" of coal for a certain season at specified prices was void for uncertainty and want of mutuality.

MAGRUDER, J.—The first point discussed by counsel on both sides is whether the trial court erred in sustaining the demurrer to the second plea, which sets up the contract of August 4, 1886. It is insisted by appellee, that the demurrer to that plea was properly sustained upon the alleged ground, that the contract of August 4 was void for uncertainty and for want of mutuality.

After a careful consideration of the terms of the contract, we do not think that it can be regarded as void for the reasons stated.

It is said by counsel for appellee, that the amount or quantity of appellant's "requirements" of anthracite coal for the season of 1886-1887 is not fixed by the contract, and that, for this reason, it is wanting in certainty; and that the contract does not bind appellant to "require" any coal, and, for this reason, is wanting in mutuality.

Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances, which both parties had in view at the time of making the contract, may be referred to for the purpose of determining the meaning of doubtful expressions. Courts will seek to discover and give the effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words which they may have used to express it. (Doyle v. Teas, 4 Scam. 202; Torrence v. Shedd, 156 Ill. 194.) The parties, representing the companies who entered into the contract of August 4, 1886, were practical business men. The word, "requirements," as used by them, evidently meant the amount or quantity of coal, which appellant would need in its business for the specified season. Appellant agreed to buy such anthracite coal, as it should need in its business for the season of 1886-1887, of appellee at a certain price per ton, and appellee agreed to furnish said amount of coal, free on board the cars at Chicago or Milwaukee, at said price per ton, as it should be ordered by appellant during said season.

The plea avers, that defendant was engaged in the purchase, use and sale of coal in its business, and that its requirements therein for that season was very large, and that such fact was well known to the plaintiff. The parties will be presumed to have contracted with reference to the knowledge which they then had upon that subject, and upon the supposition that appellant would need the same quantity of coal, which it had theretofore been in the habit of using. The word, "requirements," evidently has the same meaning as the word, "needs." The amount of coal, which was "required" for the business of that season, was the amount of coal, which was "needed" in the business of that season.

If the word, "requirements," as here used, is so interpreted as to mean that appellee was only to furnish such coal as appellant should require it to furnish, then it might be said, that appellant was not bound to require any coal unless it chose, and that, therefore, there was a want of mutuality in the contract. But the rule is, that, where the terms of a contract are susceptible of two significations, that will be adopted which gives some operation to the contract, rather than that which renders it inoperative. (Thrall v. Newell, 19 Vt. 202; Evans v. Saunders, 8 Porter 497.) A contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negatived by the language used. (Torrence v. Shredd, *supra.*) It cannot be said, that appellant was not bound by the contract. It had no right to purchase coal elsewhere for use in its business, unless, in case of a decline in the price, appellee should conclude to release it from further liability.

A contract, somewhat similar to the one now under consideration, came before this court for construction in National Furnace Co. v. Keystone Manf. Co., 110 Ill. 427. The following language there used is, with appropriate changes, applicable to the present case: "We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron, but on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant,

at the price named, its entire supply of iron for the year,—that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual. A foundry may purchase its supply of coal for the season, of the coal dealer. A hotel may do the same. A city, for the use of the public schools, may engage its supply of coal for the winter at a specified price. Such contracts are not uncommon, and we have never understood that they were void. Smith v. Morse, 20 La. Ann. 220, is a case in point. In this case Smith agreed to furnish Morse all the ice he might require for the use of his hotel for five years, at a certain price. Smith undertook to avoid the contract, on the ground that Morse was not bound, but the court held the contract valid and binding on both parties."

For the reasons stated, we are inclined to think the demurrer to the second plea should have been overruled. * * *

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§ 77.—Acts of Parties Under the Contract.

WOOLSEY ET AL. v. FUNKE.

1890. 121 N. Y. 87, 24 N. E. 191.

THIS case involves the construction of a charter-party of a steamer in which the owners agree to furnish, at their own expense, a crew, "and all supplies required by said vessel, during the term aforesaid, except water, the cost of which water and all wharfage * * * the party of the second part agrees to pay."

PECKHAM, J.—* * * I think the language is somewhat ambiguous. The plaintiffs are to furnish all supplies except water, the cost of which water the defendant is to pay. The defendant says he had only contracted to pay for the cost of the water, but not to furnish it. Have the plaintiffs, in this charter-party, made any specific agreement to furnish the water? Not at all. They have agreed to furnish all supplies required by the vessel, except water. The defendant has agreed to pay for the cost of it. If the plaintiffs have made no agreement to furnish it, the agreement of the defendant is fully carried out if he contracts with some one else to furnish the water to him, and he agrees to pay him for it. Certainly the plaintiffs would have no right to complain that the defendant procured the water from some one other than themselves, and in that way paid the cost of it. They would have no such right, because, as it

seems to me, there is nothing in the contract binding the defendant to take the water from them, and there is certainly no language on their part by which they bind themselves to furnish it. It is claimed, however, that there is an implied obligation on the part of the plaintiffs to furnish the water, founded upon the peculiar character of the language used, where they contract to "furnish all supplies except water, the cost of which water" the defendant agrees to pay. It is claimed that the only use of the exception is to qualify the obligation of the defendant, leaving that of the plaintiffs exactly the same as in the first instance, with regard to the water, as with regard to all the other supplies, and that they are still bound to furnish the water, just as much as, for instance, the coal, only the defendant must pay for such supply of water. I incline to the other view, for the reasons already stated. I cannot see that the plaintiffs have anywhere promised to furnish the water; but, on the contrary, by their language, they have excepted that article from their obligation to furnish the boat with supplies. Nor can I see where the defendant has bound himself in any way to take the water furnished by the plaintiffs.

But if I am not clearly right in this interpretation of the language, it must at least be admitted, as it seems to me, that the language is somewhat ambiguous or indefinite. Under such circumstances, the practical interpretation of this agreement by both parties is a consideration of very great importance. As was said by Mr. Justice Swayne in Insurance Co. v. Dutcher, 95 U. S. 269, 273: "The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former." Let us see, then, what the parties have said and done in regard to this matter. One of the plaintiffs proved by his own evidence, which was wholly unobjected to, that, in an interview he had with defendant, before the execution of the contract, the latter showed him a proposed schedule of trips for the steamer, and asked if she could do it. The plaintiff asked what kind of water he (defendant) was to get for the use of the vessel. Defendant said they had water at College Point, and he would continue the waterpipe to the dock. He said the water was seventy-pound pressure. Plaintiff told him that he thought, without doubt the boat could make the proposed time if he (defendant) gave her time for water; and, in respect to water, defendant said she could get sufficient water in ten minutes. The defendant himself was examined in his own behalf on the trial; and, in speaking of his interview with one of the plaintiffs before the execution of the charter-party, defendant said: "As to the charter price, he (plaintiff) hadn't quite

decided that day; but, speaking about the wharves and water, these two items I had to furnish. * * * I said to him that the water-main of the village of College Point ran down nearly to where I had begun to build the dock; and I would bring a pipe down to the end of the dock, so the hose could be attached there, and he could get a supply of water there. * * * After that time, as soon as the charter-party was signed, I ran a pipe down to the dock. * * * In pursuance of the conversation I had, I built a dock, and put a pipe down to the end of it. I connected it with the main forming part of the waterworks of the village." One of the plaintiffs says that the pressure on the pipe, instead of seventy pounds, was probably not half that, and it took three-quarters of an hour to fill the tanks of the steamer, instead of ten minutes. The plaintiff called defendant's attention to this state of things, and he answered: "How can we remedy it?" In his answer the defendant goes into detail as to the various violations of the contract by the plaintiffs, as I have enumerated them above; but he nowhere alleges, specifically, a violation of the agreement on the part of the plaintiffs by not furnishing the steamer with water. Upon the trial, on the contrary, the whole burden of the defendant was laid upon proving the various violations of the agreement which he had set up in his answer, but not any evidence was introduced as to the failure of the plaintiff to furnish water. The record shows that the defendant contended for the violations as already stated, and he claimed that the state of the boiler, its leakings and general condition, and the awkward and dilatory manner in which landings were effected, caused the failure of the boat to make its trips and keep up to schedule time; and for those reasons, as well as on account of the behavior of the crew towards passengers, and the failure to make landings when expected, the defendant urged that he had a right to refuse to go on with the contract. He showed by one of his witnesses (Beach) that, in his opinion, the delays were not caused by the water; and it is evident from the testimony of the defendant that he was of the same opinion, and that his ground for action was the violations already spoken of.

From this survey of the actions of all parties, and from the evidence of both parties to the contract, it is clear that they interpreted its obligation in the same way that I have done, and the defendant never thought that the plaintiffs had to furnish the water, while he had only to pay its cost, until after the trial, and the finding of the court that the failure of the steamer to keep time was on account of defendant's failure to furnish the water. We think the construction of the contract given below was the true one. This leads to an affirmance of the judgment.

§ 78.—Language of One of the Parties.

GILLET, AS ASSIGNEE, v. BANK OF AMERICA.

1899. 160 N. Y. 549, 55 N. E. 292.

THE plaintiff's assignors, Dan Talmage's Sons, customers of the bank, by agreement pledged to it certain property to secure a loan of $35,000 from the bank, and any other of their liabilities "to the bank, due or to become due, or which may hereafter be contracted or existing." The question was whether the agreement included a claim of $5,000 against them thereafter purchased by the bank from the New York Life Insurance and Trust Company.

MARTIN, J.—* * * The New York Life Insurance and Trust Company held a note, made by the assignors, for $5,000, which matured March 4, 1896. It was payable at the defendant's bank, and upon presentation it was not paid or charged to the maker's account, but was dishonored. Subsequently, and on the same day, the defendant purchased the note of the payee, and then sought to hold the property pledged for the security of the $35,000 loan until the $5,000 note was paid. That the defendant obtained this note by purchase and sale, and not by payment in pursuance of the implied direction arising from the note having been made payable at the defendant's bank, is plainly alleged in the defendant's answer, and fully established by its uncontradicted proof. The question in this case is whether, under any proper construction of the contract, the defendant was authorized to retain the property pledged until the $5,000 note was paid. The respondent's contention is that this agreement and note authorized the defendant to hold the property pledged not only as security for the sum loaned, and such other liabilities as were contracted or existed between them as bank and customer, but also for any and all claims against the plaintiff's assignors which it might purchase, regardless of their character, so long as they were liabilities of the assignors, and owned by the defendant. It further claims that under the contract it could have transferred the note and collaterals, and that thereupon the transferee would be entitled to retain and sell the property pledged or in its possession for safe-keeping or otherwise, not only for the payment of the liabilities of the assignors to the defendant, but also for the payment of all and any claims or liabilities of theirs held by the transferee. If these contentions are to be sustained, it must be because they are plainly stated in the contract, or necessarily implied from its express provisions. Such unusual and almost unlimited power over the property of another is not to be implied or inferred from doubtful or uncertain language. If there is any uncer-

tainty or ambiguity as to the meaning of the agreement, it should be resolved in favor of the plaintiff, as it was the defendant who prepared this contract. If there is any doubt as to the meaning of the terms employed, the defendant is responsible for it, as the language is wholly its own. We think the principle controlling as to the construction of insurance policies and other similar instruments is applicable to this agreement, and that it should be liberally construed in favor of the plaintiff. If the language can, without violence, be interpreted to include only such liabilities to the defendant as resulted from transactions between the plaintiff's assignors as customers and the defendant as a bank, or their liabilities which came into its hands in the ordinary course of its banking business, it should be adopted. Mynard v. Railroad Co., 71 N. Y. 180; Nicholas v. Railroad Co., 89 N. Y. 370; Rickerson v. Insurance Co., 149 N. Y. 307, 313, 43 N. E. 856. The reason of the rule that the language of an instrument is to be construed against the person who proposes it, rather than against the person who is invited to accept it, is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to the strict interpretation of them, rather than he who only accepts them. Where a doubt exists as to the meaning of words, resort may be had to the surrounding facts and circumstances to determine the meaning intended. If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe it was understood. White v. Hoyt, 73 N. Y. 505. In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object, and practically the only foundation, of rules for the construction of contracts, is to arrive at the intention of the parties. * * *

It is quite obvious that the primary purpose for which the plaintiff's assignors pledged to the bank the property described, and any balance which they had on deposit, was to secure the payment of the $35,000 loan. That was the only transaction in the nature of a liability which existed between the parties, or was then contemplated by them. By the agreement the assignors pledged the property mentioned and their deposit in the defendant's bank for the payment of the note of $35,000, or any other liability of the assignors to the bank, whether due or to become due, or which subsequently might be contracted or existing. It seems clear, when this agreement is construed in the light of the principles and authorities cited, and in view of the circumstances and transactions existing between the parties, that the most the defendant can properly claim for this

provision is that it was intended to secure the liabilities of the assignors to the bank arising out of the business transactions or relations existing, or which should subsequently exist, between them as bank and customer, or which came into its hands in the ordinary course of its banking business, whether past, present, or future. Under this language the bank could not hold the property pledged as security for a claim unless it was a liability of the assignors to the bank, or obtained in the usual course of business. The agreement was obviously intended to include those liabilities only. * * *

FALLEY v. GILES.

1867. 29 Ind. 114.

In this case a lease for two years provided that the lessee might hold the premises for the additional term of one, two or three years, at his election, upon the same terms.

Frazer, C. J.— * * * There is nothing in the language of the lease itself which expressly gives the lessee the privilege of electing more than once. If such is the effect of the lease, it must be so by construction. It is a rule of construction that the words of an instrument are to be taken most strongly against the grantor. But this rule is one of denier resort, applicable only where the language of the instrument will equally admit of either of two or more interpretations; in such a case, that effect will be given which is most unfavorable to the grantor. Adams et al. v. Warner et al., 23 Vt. 395. The rule is to be resorted to only when all other rules of exposition fail. 2 Bl. Com. 380. We do not regard the case before us as a proper one to be solved by the rule of construction alluded to. The language of the lease is not strictly equivocal, but, on the contrary, furnishes a means of ascertaining the exact intention of the parties. "For the additional term of one, two, or three years after the expiration of said term of two years, at the election of said party of the second part." This excludes the idea of two or three additional terms. But one additional term is provided for, which may have a duration of one, two, or three years, as the lessee may elect; not three, or less, additional terms of one year each, as the lessee may from year to year elect. It is evident that the latter construction, the privilege of three terms and three elections by the lessee, cannot be adopted without violence to the language of the lease, while one term, and consequently one election, is in perfect harmony with it. The language, then, it seems to us, defines the extent of the grant, and negative words, to exclude anything more, would have been unnecessary and superfluous. * * *

FOREST CITY INS. CO. v. HARDESTY.

1889. 182 Ill. 39, 55 N. E. 139.

MAGRUDER, J.—The policy of insurance in this case contains, among other conditions, the following condition: "If any change takes place in the title, possession, or interest of the assured in the above mentioned property, * * * this policy shall be void." The insurance company agrees to make good the loss during a period of five years from January 21, 1892, to January 21, 1897. The assured, Henry Hardesty, died on April 16, 1894, and the fire, which destroyed the dwelling houses, occurred on November 28, 1895. The death of the assured and the loss both occurred within the five years. The loss of the property by fire occurred, however, after the death of the assured. Upon this statement of facts the appellant contends, that the death of the assured, thus occurring before the loss, worked such a change of title and possession in the property insured, as to make the policy of insurance void; and that, therefore, the appellant is not liable in this action.

The contention of the appellant assumes that the words, "change of title," as used in the policy, refer to and include the involuntary change of title caused by the death of the assured. The question, therefore, to be determined is whether, under the language of this policy and the facts of this case, the death of the assured caused such a change of title in the property insured, as to make the policy void. * * *

The condition, which provides that, if any change takes place in the title of the assured, the policy shall be void, is a condition which provides for a forfeiture. In other words, the assured party is to submit to a forfeiture of his right of action, if any change takes place in the title. It is a well settled rule, that forfeitures are not favored either in equity or in law. Consequently, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. (Webster v. Dwelling House Ins. Co., 53 Ohio St. 558.) It would seem to be unjust and inequitable, that a forfeiture should be enforced because of an act for which the assured is not responsible, and which is in no way his fault. It would be proper to hold the assured responsible for any act of forfeiture which is within his control. There is no claim, here, that the death, which caused the change of title, was the result of suicide, or of any improper conduct on the part of the assured.

The change in title by death of the assured does not seem to have been contemplated by either party to the contract of insurance. Hence, although the words "change of title" may be broad enough to include the change worked by death, yet the assured will not be bound by such construction. In Bailey v. DeCrispigny, L. R. 4 Q. B.

185, it was said: "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Whether or not the words, "change of title," as used in this policy, refer to a voluntary act on the part of the assured, or to an involuntary act like death, is, to say the least, a matter of doubt, and involves a question of doubtful construction. Where the words in a contract of insurance are so framed as to leave room for construction, the courts are inclined to lean against that construction, which will impair the indemnity of the assured. If the clause in a policy is susceptible of two interpretations, that one will be adopted, which is most favorable to the assured, in order to indemnify him for the loss which he has sustained. (Illinois Mutual Ins. Co. v. Hoffman, 31 Ill. App. 295.) In Commercial Ins. Co. v. Robinson, 64 Ill. 265, we said: "Equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company." (Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Schroeder v. Trade Ins. Co., 109 *id.* 157.) "The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy." (1 Phillips on Insurance, § 124.) Hence, the contract is always to be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity. (Healey v. Mutual Accident Ass., 133 Ill. 556.) It is a rule of law, as well as of ethics, that, when the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense, in which he had reason to suppose it was understood by the promisee." (Hoffman v. Ætna Ins. Co., 32 N. Y. 413.) These rules of construction are applied to provisions and conditions in policies of insurance, because such policies are prepared by the companies themselves, and the language, in which they express their obligations and limit their liabilities, is selected by them, and not by the insured parties. (Commercial Ins. Co. v. Robinson, *supra;* Webster v. Dwelling House Ins. Co., *supra.*) * * *

BOLIO ET AL. v. MARVIN.

1902. 130 Mich. 82, 89 N. W. 563.

IN this case a clause in a deed read "saving and preserving from the operation hereof the road running along the southerly line of said parcels."

MONTGOMERY, J.—* * * The decision of the circuit judge rested upon the construction of the deed of Gideon Bolio to Whiting. The circuit judge correctly held that, in determining whether this clause was intended as an exception to the grant or was simply a reservation of an easement, the two cardinal rules of construction should be kept in mind, namely, that the intent of the grantor is to be gathered from the whole instrument, and that the language employed is to be taken most strongly against the grantor. Having these rules in mind, we think the circuit judge reached the correct conclusion. It is to be kept in mind that the grant was broad enough to cover the land included in this road, and that the road would not have been open to the grantor to use unless by some stipulation he retained the right to use it. The language employed was, "saving and preserving the road." We think this language means "saving and preserving the right to use the road." As pointed out by the learned circuit judge, had the purpose been other than this, the fair inference is that the land conveyed would have been bounded by the highway. There was not the slightest occasion to include this land in the deed, unless some interest was intended to be vested in the grantee. We find this view sustained by numerous cases. See Gould v. Howe, 131 Ill. 490, 23 N. E. 602; Sullivan v. Eddy, 154 Ill. 199, 40 N. E. 482; and Capron v. Kingman, 64 N. H. 571, 14 Atl. 868,—a case quite in point. * * *

CENTRAL TRANSPORTATION CO. v. PULLMAN'S PALACE CAR CO.

1890. 139 U. S. 24.

GRAY, J.—* * * By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and

because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 420, 544-548; Dubuque & P. R. Co. v. Litchfield, 64 U. S. 23 How. 66, 88, 89; Slidell v. Grandjean, 111 U. S. 412, 437, 438. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 26, 27. * * *

THE DISCHARGE OF CONTRACT.

§ 79.—Modes in Which a Contract May be Discharged.

A contract may be discharged:

By valid agreement to that effect;

In accordance with provisions for its discharge;

By performance of the contract;

By impossibility of performance in certain cases;

By the operation of rules of law, upon certain sets of circumstances;

Against the injured party at his option, by breach of the contract in certain ways;

By discharge of the right of action arising from breach of the contract.

CHAPTER VIII

DISCHARGE OF CONTRACT BY AGREEMENT.

§ 80.—When Discharged by Mere Agreement.

METCALFE v. KENT.

1898. 104 Iowa 487, 73 N. W. 1037.

ACTION upon a written contract to recover commissions for the sale of real estate. Defendant answered, admitting the execution of the contract, and alleging that it was without consideration, that plaintiff failed to perform his part, and that a full settlement had been made with plaintiff. At the conclusion of the evidence, the court, on motion of the plaintiff, directed a verdict for plaintiff for the amount claimed, and rendered judgment thereon. Defendant appeals.

GIVEN, J.— * * * As to the alleged settlement, the defendant testifies as follows: "I met Mr. Metcalfe the day I sold the farm after the contract was drawed up; met him in front of the First National Bank in Sac City; and I told him that I had sold my farm. 'Now,' I says, 'you had better come up, and give me up my contract.' He says: 'That don't amount to anything. I don't charge you any commission.' I says, 'All right, I will set up the cigars and call it square.' He says, 'That is all right, sir.' Mr. Tom Riddinough was present at this conversation. Since that time there has been no conversation between Mr. Metcalfe and myself concerning this matter; nothing more than I spoke to him here some time ago, after he had sued me, and I asked him what he done it for, was all the conversation we had." Riddinough testifies: "Mr. Kent says to Mr. Metcalfe, 'I sold my farm.' Mr. Metcalfe says, 'Is that so?' and he says, 'Yes, and I thought I would get my contract.' Mr. Metcalfe says: 'That contract is no account. I don't charge anything for it.' Mr. Kent pulled out a cigar, 'If that is all you charge, I will treat you, and call it square.' Mr. Metcalfe says, 'That is all right.'" We have seen that under the contract and the fact of the sale to Gregory defendant was liable to plaintiff for the commission named on the $8,400. Defendant's counsel contend that a consid-

eration is not necessary to a release from the liability, citing Stensgaard v. Smith, 47 Minn. 11, 44 N. W. 669. Plaintiff's counsel contend that a consideration is necessary to sustain a release, citing Whitehill v. Wilson, 3 Pen. & W. 405, and Shaw v. Pratt, 22 Pick. (Mass.) 308. In the case of Stensgaard v. Smith, in the writing, signed by Smith alone, in consideration of plaintiff's agreeing to act as agent for the sale of the property, Smith gave him the exclusive sale of the property for three months, and agreed to pay a commission "for his services rendered in selling," etc. The court held that this was not a contract, for want of mutuality, but conferred a present authority to sell, revocable at any time before a sale was effected by plaintiff. In this case there was a mutuality, and hence a contract, irrevocable except by consent of the parties. The cases cited by plaintiff's counsel sustain the claim that the release of an existing indebtedness is a new contract, and, to be binding, must be based upon a consideration. It is not seriously contended that the cigar was given or received as a consideration for the claimed release. Surely, such a trifle as that could not have been so intended. In determining whether the court erred in ordering a verdict, we do not consider plaintiff's evidence denying that there was any settlement or release.

Accepting the evidence for defendant as true, it fails to show any consideration for the alleged release. Therefore, though made as claimed, it is not binding, and is no bar to plaintiff's right to recover. There was no error in sustaining plaintiff's motion for a verdict, and the judgment is therefore affirmed.

ELLSWORTH v. FOGG ET AL.

1862. 35 Vt. 355.

ALDIS, J.—* * * Does acceptance of a part of the amount due on a promissory note, in satisfaction and discharge of the whole note, and a surrender of the note by the owner to the maker, to be cancelled, bar a suit brought by the owner for the recovery of the unpaid portion?

We are not disposed to disturb the rule as stated in Wheeler v. Wheeler, in the 11th Vt. 60, that payment of a part of a debt upon an agreement that it shall be satisfaction of the whole, even though the agreement and payment are shown by a receipt, will not extinguish the whole debt. It is claimed here that besides the part payment and the agreement, there is another element—the surrender

of the notes to the maker—which operates as a complete discharge of the whole amount due upon them. * * *

We must abide by the old decisions, which have long since determined, that payment of part in discharge of the whole does discharge the whole, if shown by a release under seal, but if shown by a written agreement, or a receipt, or any proof short of a release, it does not.

In the notes to Cumber v. Wayne, in 1 Smith's Leading Cases 450, the American annotator argues that this rule of law requiring proof of such an agreement by technical release "is a principle duly established in the elements of the law, which has long sustained itself in the courts, and rests on something better than a mere technicality." He proceeds, "But as a principle of evidence, this rule, which requires for the substantiation of such agreements, either a surrender of the instrument, or a legal release, is a just, wise and convenient rule; so great is the danger of fraud and mistake."

That the rule so much commended by the writer has been materially shaken, both in England and some of our American states, is amply shown by the cases so copiously cited in his notes. It is not, perhaps, desirable that a rule of law so long settled and acted upon as this has been, in this state, should be disturbed by judicial decision. Nor is it necessary even to examine it and its qualifications, in order to decide this case. It is sufficient for us to hold that the surrender of an instrument to be cancelled by the party to whom it belongs, is equivalent to a release.

A release is the act of a party by which he does what he has agreed to do. Before the release is executed, his liability stands upon agreement merely, and if the agreement is without consideration, he may legally refuse to do what he has agreed. He may back out from his agreement, but not from his release.

The surrender of the instrument in which the party's rights appear is also the act of the party. Giving it up would seem literally to be dissolving the contract *"eo ligamine quo ligatur."*

We think the surrender of the notes by the owner to the maker may well be put upon the same ground as a release,—as being an act of the highest significance and clearest import to show the deliberate and well understood agreement of the parties. It is their agreement executed;—a release in practical operation. It is free from liability to mistake or fraud. The deliberate surrender of notes by the owner to the maker, to be cancelled, is an act which no man of prudence, or of the least knowledge of business, would do, unless he intended to discharge the debt. A release, as well as the surrender of notes may be procured by deceit and fraud,—but when they are made according to the intent of the parties, they should be sustained. * * *

LEACH v. KEACH.

1858. 7 Iowa 232.

BILL for specific performance.

WOODWARD, J.—The defendant's answer admits the contract, but pleads, among other things, that plaintiff, some years before, went to California, and, before leaving, wished defendant to rescind the contract, and deliver up the notes, offering to deliver up the obligation. He avers that it was fully and finally agreed between them, and they bound themselves, respectively, to deliver up the said papers, and annul the agreement; that the reason why this contract was not then actually carried into effect was, that the obligation was then in Lee county, while the parties were in Jefferson county; and that plaintiff agreed to send the bond to defendant, and he was then to deliver the notes; but the bond was never sent. The respondent alleges that he knows of no one by whom he can prove this agreement beside the complainant himself, and therefore he makes oath to the answer, and calls for a reply under oath.

The complainant demurred to this answer, and alleges, as the only cause, that it was without consideration, and therefore void. This being overruled, a reply was filed, which was sworn to by Lydia Leach, the wife of the complainant. * * * We are of opinion that the court erred in rendering a decree on this reply, and it will be set aside.

The only other point which need be touched upon, is the demurrer of complainant to the respondent's answer. The only cause of demurrer being, that the agreement stated was without consideration, we think there was no error in overruling it. The desire of the complainant to have the contract discharged, and the mutual promises to deliver up the obligations held by them respectively, constituted a sufficient consideration on both sides.

The decree of the district court is reversed, and the cause is remanded for a reply as called for in the answer, and for other proceedings in accordance with this opinion.

Two persons enagaged to marry each other may, by a mutual agreement, rescind the engagement. King v. Gillett, 7 M. &. W. 55, 58.

An agreement to rescind a contract may be implied. See Benjamin, Principles of Contract, p. 314.

§ 81.—Change in the Terms.

ROLLINS v. MARSH.

1880. 128 Mass. 116.

ACTION by Emily R. Rollins for board, lodging and care furnished Lucy A. Rollins, an insane person, of whom the defendant was guardian. The defendant, on March 20, 1874, made with the plaintiff the written contract declared on; and the plaintiff then entered into possession of the real and personal estate therein named, and continued in possession thereof until April 1, 1877. The plaintiff assumed the care and support of Rollins on March 20, 1874, under the contract, and continued such care and support until December 11, 1876, when Rollins, with the consent of the plaintiff, left for a visit to her daughter, and died while thus absent, on October 27, 1877. The plaintiff contended that, a few weeks after March 20, 1874, she found the support and care of Rollins more onerous and expensive than she had anticipated, and more than it had previously been; that she requested the defendant to remove her, and declined to continue her future care unless the defendant would make a further compensation therefor; and that the defendant thereupon agreed to make her such further compensation as should be right.

The jury returned a verdict for the plaintiff; and the judge reported the case for the determination of this court. If the action could be maintained, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside.

SOULE, J.— * * * The original contract made by the defendant for the support of his ward was his own contract, and the subsequent arrangement made for further compensation to the plaintiff, was his own contract, on which he alone, if any one, was liable to the plaintiff. * * * The defendant contends that this subsequent arrangement did not impose any liability on him, because it was without consideration. The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfill unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement. Meanwhile the plaintiff had continued in the performance of her original agreement, which was recognized by both parties as subsisting and binding, till it was rescinded by the making of the new one. The release of one from the stipulations of the original agreement, is the consideration for the release of the other; and the mutual releases

are the consideration for the new contract, and are sufficient to give it full legal effect. Cutter v. Cochrane, 116 Mass. 408. The action can be maintained, and, according to the terms of the report, there must be judgment on the verdict.

BACON ET AL. v. COBB ET AL.

1867. 45 Ill. 47.

BREESE, C. J.— * * * An examination of the various counts in the declaration, and of the evidence, clearly shows that the original contract, though the time of performance was liberally extended by the plaintiffs, was not performed within the extended time, and the defendants argue, in effect, "Though true it is we made the contract, and you extended the time of its performance, and though we did not comply with the contract as extended, we are absolved from all obligation to comply with the original contract, for that extension was a new contract, and you did not declare upon it in the declaration." In other words, they do not deny they made the contracts, as set out in the declaration, but insist, as further time was given them in which to perform them, which they did not offer to do, the plaintiffs cannot recover on the contract as made.

Numerous authorities might be cited to the point, that, where a party agrees to accept the thing to be delivered at a time or place other than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking. It imposes no new duty on the defendant; he merely accepts as performance by the plaintiff that which would not otherwise have been so, and the defendants' liabilities on the original contract remain unchanged. Some of these authorities are cited by the appellees. McCombs v. McKennan, 2 Watts & Serg. (Pa.) 216; Cummings v. Arnold, 3 Met. (Mass.) 486; Robinson v. Batchelder, 4 N. H. 40; Richardson v. Cooper, 25 Maine 450.

The corn, by the original contract, was to be delivered at Cairo by the 15th of March, 1865; and, by correspondence and agreement with the plaintiffs, in view of the difficulties of which the defendants complained, the time of delivery was extended to the 1st of April, again to the 10th, and then to the last day of April. It would be strange law, indeed, if the defendants were allowed to say that, inasmuch as you gave us further time in which to perform our contracts, and we did not comply, you have no right to an action against us on our original contract; and this is the burden of many of the instructions, and a large part of the theory of their case. There is

no merit in this plea of a new contract, or of variance in the one declared on. * * *

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§ 82.—New and Independent Contract Concerning Same Matter.

HARRISON ET AL. v. POLAR STAR LODGE.

1886. 116 Ill. 279, 5 N. E. 543.

A MASONIC lodge, being entitled to a deed for a lot verbally given it in consideration of its putting a building thereon, procured the holder of the legal title, the vendor, to make an advance of $459 to satisfy a debt it owed to one Means, and agreed, if he would pay the debt, to give him possession of the lot and all the buildings thereon, except the lodge room in the second story, and retain the title as security for the money so advanced, reserving a right to redeem by paying him the sum advanced, by a day named; and it was agreed that if payment was not made by that day, then the lot and buildings should be the property of the original vendor. Bill by appellee for specific performance.

MAGRUDER, J.—* * * Surely the facts recited would if proven, constitute a good defense, and it was wrong to deprive appellants of the opportunity of proving them. If they are true, appellants should not be decreed to convey the premises to appellee. Courts of equity will not always enforce the specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court must be governed, to a great extent, by the facts of each case as it is presented. (Fish v. Leser, 69 Ill. 394.) Equity will withhold its aid if there is anything that makes it unconscionable, from change of circumstances, lapse of time, or otherwise, that the party should have an execution of his agreement. (Kimball v. Tooke, 70 Ill. 553.) According to the new matters set up in the answer, Harrison never parted with the legal title to the lot. After the removal of the building he held it in trust for appellee. He could be called upon to make a deed, provided no such change of circumstances occurred as would make it inequitable for him to do so. But while he was thus holding the legal title, appellee the equitable owner thereof, instead of demanding a conveyance from him, requested of him an advance of money, and authorized him to continue to hold the title as a security for such advance. The nature of his trust changed. A new equity intervened. Before the payment to Means he held the title in trust, to be deeded to the equitable owner upon demand made; after the payment he

held it in trust to secure a debt from the equitable owner to himself. So long as that debt remained unpaid, it was not right to require him to make a deed to the lodge. If Harrison had deeded the property to the lodge prior to February 4, 1882, and had made a loan to the lodge on that day, and had taken back from it to himself a deed which, though absolute on its face, was understood between them to be merely a mortgage to secure the payment of a loan, he could not be called upon for a re-transfer of the title until his loan was paid. The case is not different because, being already vested with the title, he is allowed to keep it as a security for the loan.

A new contract was made between appellee and Harrison, which rescinded the old contract and was a bar to its performance. Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in the Roman law. When an agreement is thus rescinded by novation, the contract in existence prior to the novation loses its individuality, and becomes merged in the new contract. (Fry on Specific Performance, § 998, *et seq.*) Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract, will amount to a rescission of it. (*Id.*, § 1003.) And the rescission or novation may be by parol. (*Id.*, §§ 1000 and 1017.) Appellee passed a resolution, by the terms of which it agreed to refund the $459.15 to Harrison by December 25, 1882, and in default of its so doing, that Harrison might become the absolute owner of the house and lot then held by him. This resolution was reduced to writing. Appellee has never repaid the money, and it would be unjust to give it both the money and the property.

Brown does not claim to be an innocent purchaser without notice. He admits that he took his deed with notice of appellee's rights, and he and Harrison both express their willingness to convey the property to the lodge upon its payment to them of the advances made by them for debts, outlays and improvements. The averments in the answer are to the effect that the property, independent of the improvements thereon made and paid for by appellants, was not worth much more than the amount of Harrison's advance. * * *

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§ 83.—Release.

KIDDER v. KIDDER ET AL.

1859. 33 Pa. St. 268.

THOMPSON, J.—A release under seal is sometimes called a technical release; although in equity it has no greater effect than a parol release, yet it differs from the latter in one quality materially, it is self-sustaining, the seal implying a consideration. Not so is it with

a release not under seal. There a consideration of some sort is necessary to support it. 2 Dan. C. Pr. 766; Whitehall v. Wilson, 3 Penn. R. 405; 1 Barr (Pa.) 445; 7 Barr (Pa.) 100, 1 Rawle * * *

The release in question, in this case, is without a seal, and without any consideration expressed. As a release it was void. It was *nudum pactum,* and should have been so held by the court. * * *

SNOW v. GRIESHEIMER.

1906. 220 Ill. 106, 77 N. E. 110.

CARTWRIGHT, C. J.— * * * The lease was under seal, leasing a store building in Chicago for a term of three years ending April 30, 1898, at a rental of $18,000, payable in monthly installments of $500, in advance, on the first day of each month. The lessee was to keep the premises in good repair, and was to be allowed $500 toward the cost of a new store front and in lieu of repairs and alterations in the premises. The witnesses for both parties testified that in the spring of 1896 there was an agreement reducing the rent to $416.66 per month, but the testimony for the plaintiff was that the reduction was only for the summer months of 1896, after which the rent was to be the same as before, and that the reduction was made because the defendant complained that business was poor and he was losing money. The testimony for the defendant was that the reduction was for the remainder of the term, and was made in consideration that he would re-paper the store, paint the woodwork and put iron shutters on the rear, which he testified that he did. The judgment of the appellate court settled the controversy as to the making and terms of the contract in favor of the defendant. The rent was paid at the rate of $500 per month up to May 1, 1896, when the agreement for the reduction became operative, and after that time the defendant paid $416.66 monthly for the remainder of the term, by checks which on their face were in full for the rent and were offered as full payment. They were received and collected by the plaintiff, although she did not assent to the claim that they were in full of rent after the summer months of 1896, and only credited them on account after that time.

The agreement to reduce the rent was verbal, and it is contended that the court erred in admitting evidence that the agreement was entered into, for the reason that an executory contract under seal cannot be modified or changed by an agreement not under seal. That is the settled law. (Goldsborough v. Gable, 140 Ill. 269; Alschuler v. Schiff, 164 *id.* 298.) So long as the contract contained in the

lease under seal remained executory, the plaintiff had a right to repudiate the parol agreement and claim the full amount of rent contracted for. The rule of law, however, is one that defeats the intention of the parties, and while it should be enforced in every case to which it applies, it is not to be extended to other cases to which it does not properly apply. If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed. The lease expired April 30, 1898, before suit was brought, and the evidence tended to show that it had been fully performed by both sides. The fact that it had been so performed could be shown in defense of the suit. (White v. Walker, 31 Ill. 422; Worrell v. Forsyth, 141 *id.* 22, 9 Cyc. 597; McKenzie v. Harrison, 120 N. Y. 260.) * * *

DOHERTY v. DOE.

1893. 18 Colo. 456, 33 Pac. 165.

HAYT, C. J.—Plaintiff in error questions certain of the findings of fact made by the referee, but upon careful examination we think the evidence fully sustains such findings. The salient points upon which the decision must turn in our opinion are not contradicted. These are that Healy held the legal title to the property, with authority to control and manage the same, with power to lease, collect the rents, and apply the same in satisfaction of his claim. In pursuance of this authority he did execute a written lease of the property to defendant in error, and afterwards, finding that she was unable to pay the stipulated rent, he agreed to a reduction of the same. It further appears that defendant in error paid the entire rent, calculated at the reduced rate, and that she had a final settlement of the matter with Healy before the lease was assigned to Doherty. It is contended that the parol promise of a reduction is without consideration and also that it falls within the statute of frauds. The defendant in error, by refusing to perform the written contract, subjected herself to such damages as might be sustained by the lessor. He, however, elected to waive the written lease, and she agreed to continue the hotel business under a promise of a reduction of the rent. This was a sufficient consideration for the promise. Monroe v. Perkins, 9 Pick. (Mass.) 798. Is the oral agreement void, by reason of the statute of frauds? The referee fixed the time at which the lease was modified by parol at the month of September, 1887. At this time more than one year of the two-year term fixed by the lease had expired, and it has been held that a modification by parol for a period less than one year is not within the statute of frauds. Smith v. Devlin, 23 N. Y. 363. We

prefer, however, to rest the decision upon another principle of the law of contracts. This may be stated as follows: When the terms of an instrument required to be in writing under the statute of frauds are afterwards modified by parol, and as so modified have been fully carried out, the obligation is discharged. Bishop, in his work on Contracts, as § 135, says: "If a parol agreement rescinding a specialty is fully executed, it will be effectual." And in the well-considered case of Long v. Hartwell, 34 N. J. Law 116, it is said: "A contract under the dominion of the statute of frauds can be no more secure against invasion by parol than a sealed instrument." See, also, Munroe v. Perkins, *supra;* Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Lawrence v. Dole, 11 Vt. 549; Canal Co. v. Ray, 101 U. S. 522; Dickerson v. Commissioners, 6 Ind. 128; Phelps v. Seely, 22 Grat. (Va.) 573; Dearborn v. Cross, 7 Cow. (N. Y.) 48; 1 Greenl. Ev. (14th Ed.), § 303. Healy, at the time he assigned the lease, had no cause of action upon the same against defendant in error, and his assignee, Doherty, therefore took nothing by the assignment.

The judgment is affirmed.

THOMAS v. POOR ET AL.

1895. 147 N. Y. 402, 42 N. E. 13.

ON THE 1st of April, 1885, the parties entered into a contract in writing under seal for the sale by the plaintiff to the defendants of the bark on the hemlock trees on the Harris lot, owned by the plaintiff, at a specified price per cord, to be peeled by the defendants, 800 to 1,000 cords in 1885, and not less than 1,000 cords in each year thereafter. The answer denied certain of the allegations in the complaint, and set up as an affirmative defense that in the year 1885, after the making of the written contract of April 1, 1885, the parties thereto, by an agreement between them, modified and changed the contract by limiting the amount of bark which the defendants should be required to peel in the year 1886 to 500 cords, and alleged performance of the modified contract.

ANDREWS, C. J.— * * * It is important to notice that the controversy in the present action relates solely to the performance of the contract of April 1, 1885, as respects the year 1886. By that contract the defendants were to peel in that year not less than 1,000 cords. In fact they peeled only 500 cords, and they allege as an excuse for not peeling the full 1,000 cords in that year the oral agreement made in the fall of 1885. The effect of the oral agreement, if made, and valid as a contract, was to change the terms of the original written agreement as to the time and manner of performance. It did not diminish the aggregate amount of bark to be peeled and taken by the

defendants, but it extended the time within which it was to be peeled and taken to double the time fixed by the original contract, and as a necessary incident extended the right of entry for the same period; and meanwhile, during such extended period, by natural growth of the trees, bark might be brought within the sale which otherwise would not come within the contract. If we were now required to decide the question whether a contract in writing within the statute of frauds can be altered as to the time of performance by a subsequent oral executory agreement made between the parties upon sufficient consideration, we should find the question under the authorities involved in distressing perplexity. It is now the settled doctrine of the English courts, contrary to the earlier rule declared in Cuff v. Penn, 1 Maule & S. 21, that such a contract cannot be changed as to the mode or time of performance by an oral executory contract. Stead v. Dawber, 10 Adol. & E. 57; Hickman v. Haynes, L. R. 10 C. P. 598. In many of the states in this country the courts have adopted the rule laid down by Lord Ellenborough in Cuff v. Penn, *supra,* and have held such proof admissible on the distinction between the contract, which it was said the statute requires to be in writing, and its performance, to which the statute does not apply. This is the rule in Massachusetts, New Hampshire, Maine, Ohio, and Pennsylvania, and perhaps other states. The cases are referred to in a note in Wood, Frauds, p. 758. In this state the rule does not seem to be authoritatively settled. In Blood v. Goodrich, 9 Wend. (N. Y.) 68, Chief Justice Savage expressed the opinion that the time of performance of a written contract for the sale of land could not be enlarged by parol, but the case was decided on another ground. There are dicta in this court and some decisions in other courts of the state to the contrary. Blanchard v. Trim, 38 N. Y. 225; Flynn v. McKeon, 6 Duer (N. Y.) 203; Stone v. Sprague, 20 Barb. (N. Y.) 509. But we deem it unnecessary to determine this important question here, for the reason that, without disputing the doctrine contended for by the learned counsel for the plaintiff, that the oral agreement sought to be proved was inadmissible to change the terms of the written contract, it was competent to establish, in connection with other facts offered to be shown, a waiver by the plaintiff of the requirements of the original contract that the defendants should peel 1,000 cords of bark in 1886, which had been enacted upon and become executed by the lapse of time before the commencement of the action. We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time, and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent, and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent, and treat the non-

performance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the other party who seeks to recover damages for non-performance induced by an unrecalled consent. The party may, in the absence of a valid and binding agreement to extend the time, revoke his consent so far as it has not been acted upon; but it would be most inequitable to hold that a default, justified by the consent, happening during its extension, should furnish a ground of action. It makes no difference, as we conceive, what the character of the original contract may be,—whether one within or outside the statute of frauds. The rule is well understood that, if there is forbearance at the request of a party, the latter is precluded from insisting upon non-performance at the time originally fixed by the contract as a ground of action. The case is not as manifest where the party who solicited the forbearance alleges the consent of the other party as an excuse for non-performance. But in such a case, where one party to a contract before the time for performance by the other party has arrived, consents, upon his request, to extend the time of performance, he must be presumed to know that the other party relies upon the consent; and until he gives notice of withdrawal he has no just right to consider the latter in default, although meanwhile the contract time has elapsed. We think the principle of equitable estoppel applies in such case. See Pierrepont v. Barnard, 6 N. Y. 279; Hoadly v. McLaine, 10 Bing. 482; Leather-Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Longfellow v. Moore, 102 Ill. 289. The proof offered by the defendants, if it had been received, would have permitted the inference that the omission of the defendants to peel more than 500 cords of bark in the year 1886 was owing to the oral arrangement, unrevoked, which, if it did not amount to an enforceable contract, operated nevertheless to excuse the alleged breach. The objection that a sealed contract can only be changed by a contract of equal solemnity according to the principle of the common law to which we have adverted (assuming that the principle has any longer any practical existence,—see McCreery v. Day, 119 N. Y. 1, 23 N. E. 198), is answered by what has been said on the subject of waiver, which applies equally to sealed and unsealed contracts. * * *

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§ 84.—Change in the Parties.

HEATON v. ANGIER.

1835. 7 N. H. 397.

IN THIS case the defendant having bought a wagon (the price of which is subject of the action) of the plaintiff at auction, sold it immediately afterwards, on the same day, to one John Chase. Chase and the defendant then went to the plaintiff, and Chase agreed to

pay the price of the wagon to the plaintiff for the defendant, and the defendant agreed to take Chase as paymaster.

GREEN, J.—In Tatlock v. Harris (3 D. & E. 180), Buller, J., said: "Suppose A owes B £100, and B owes C £100, and the three meet and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover the sum from A."

The case thus put by Buller is the very case now before us. Heaton, Angier, and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon.

The agreement of the plaintiff to take Chase as his debtor was clearly a discharge of the defendant. Wilson v. Coupland, 5 B. & A. 228; Wharton v. Walker, 4 B. & C. 163; Cuxon v. Chadley, 3 B. & C. 591.

HILL ET AL. v. WARNER ET AL.

1898. 20 Ind. App. 309, 50 N. E. 582.

ROBINSON, J.—* * * It can be said that there was an agreement that Baxter would assume the Warner debt, but this was a separate, independent transaction between Warner and Baxter. But it cannot be said that the evidence shows that Mrs. Hill agreed with Baxter to accept him as payor, and release Warner; but, even if the evidence established that fact, it was an agreement independent of the agreement between Warner and Baxter, and would not amount to the extinguishment of the Warner debt. Novation is a new contract made with intent to extinguish one already in existence. The doctrine is of civil-law origin. It may be made by the substitution of a new contract between the same parties in place of the old one, or by substituting a new debtor in place of the old one, with intent to release the old debtor, or by substituting a new creditor, to whom is transferred all the rights of the old creditor. In each of these cases the extinguishment of the old debt constitutes the consideration for the new obligation. It has often been held that in every novation there are four essential requisites: A previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new one. Unless the old debt is extinguished, the new agreement is without consideration. The creation of the new obligation,

and the extinguishment of the old, take place at the same time. Clark v. Billings, 59 Ind. 508; Morrison v. Kendall, 6 Ind. App. 212, 33 N. E. 370; Kelso v. Fleming, 104 Ind. 180, 3 N. E. 830; Horn v. McKinney, 5 Ind. App. 348, 32 N. E. 334; Parsons v. Tillman, 95 Ind. 452; McClellan v. Robe, 93 Ind. 298; Davis v. Hardy, 76 Ind. 272; Manufacturing Co. v. Probasco, 64 Ind. 406. In the case at bar there is a failure of proof that there was a meeting of the three minds upon the proposition that the old debt should become the obligation of a new debtor. There is no evidence to show either that there was a mutual agreement among all the parties to substitute a new debtor for the old debtor, or that there was an extinguishment of the old debt.

CHAPTER IX

PROVISIONS FOR DISCHARGE.

§ 85.—Non-Fulfilment of a Specified Term.

GOODRICH v. VAN NORTWICK.

1867. 43 Ill. 445.

WALKER, C. J.—It appears from the evidence in this case, that appellee's son, as the agent of his father, went to appellant in the spring of 1862, and purchased and paid for a fanning mill to clean wheat. It was however understood by the parties, that if the mill suited appellee, and answered the purpose, he was to keep it, otherwise, it was to be returned within thirty days from the time the purchase was made, and the money was to be refunded. The mill was returned within the thirty days, upon the ground that it did not suit appellee or answer the purpose for which it was purchased. Appellant, on the return of the property, refused to refund the money, and a suit was instituted before a justice of the peace for its recovery. The case was removed to the circuit court of Kane county, where a trial was had resulting in favor of appellant, but a new trial was granted, after which the venue was changed to the court of common pleas of the city of Aurora. On a trial in that court, appellee recovered a judgment for twenty-five dollars, to reverse which, the cause is brought to this court.

But one question arises in the case, and that is as to the true construction to be given to the agreement. By this agreement did appellee have the option of returning the machine, or was he bound to show, that it failed to answer the purpose reasonably well for which it was designed? The terms of the agreement were, that if it suited and answered the purpose. It is manifest, that it was required to answer both requirements. If it did not suit appellee then he had the right to return the property, and he was by the terms of the contract to be sole judge of whether it suited him. That did not depend upon the opinion or judgment of other persons. It was a right he reserved by his contract, and having reserved the right, he could not be prevented from exercising it within the limited period.

Again, if it did not answer the purpose for which it was purchased he had the right to return it within the time. But, failing to suit he was not bound to show that it did not answer the purpose of its purchase. All evidence therefore introduced to prove that it did not work well was unnecessary, and immaterial to the issue. It did not suit appellee, and he returned the property within the stipulated period, and according to the agreement appellee was bound to prove nothing more. The court therefore did not err in rejecting the evidence offered by appellant, to prove that the machine was capable of performing well, and would have answered the purpose for which it was sold, had it been properly used. Such evidence was outside of the issue. We are unable to see that any error was committed by the court below in trying the cause, and the judgment must be affirmed.

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§ 86.—Fulfilment of a Condition Subsequent.

A contract may be made determinable by the fulfilment of a condition subsequent.

A good illustration is a penal bond, which is a promise to pay a certain sum of money defeasible upon a condition expressed therein. In an official bond the condition is the faithful performance of the duties of an office.

GRAY v. GARDNER ET AL.

1821. 17 Mass. 188.

ASSUMPSIT on a written promise to pay the plaintiff $5,198.87, with the following conditions annexed, viz., "on the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14, 1819.

In an action upon this promise it was held at the trial that the burden was on the defendants to prove the arrival of the oil and that to constitute such arrival, the vessels must be moored within the time stipulated. The opinion on both these points was objected to by the defendant, and the questions were saved. If it was wrong on either point, a new trial was to be had; otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

PARKER, C. J.—The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event, viz., the arrival of a certain quantity of oil, at the specified places, in a given time. It is like a bond with a condition; if the obligor would avoid the bond, he must show performance of the condition. The defendants, in this case, promise to pay a certain sum of money, on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them; and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before 12 o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor, or is moored. She may sink, or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance; and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned, before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.

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§ 87.—Occurrence of an Event.

A CONTRACT may be made determinable by the occurrence of an event.

The occurrence of one of the "excepted risks" of a charter party, as the "restraint of rulers" (a) or "perils of the sea" (b) whereby the voyage is justifiably abandoned, discharges the ship-owner.

(a) A blockade. Geipel v. Smith, L. R. 7 Q. B. 404.

(b) A severe storm, leaving the vessel in a helpless condition. The Calvin S. Edwards, 50 Fed. 477.

SCHUERMANN v. DWELLING HOUSE INS. CO.

1896. 161 Ill. 437, 43 N. E. 1093.

THE plaintiff in error, who was the plaintiff in the trial in the superior court, brought an action upon an insurance policy, to recover for loss by fire for the value of the insured building. The policy contained the following condition, which is relied upon for

forfeiture and avoidance of the policy: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void. * * * If the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied or not in use." Whether the buildng insured was vacant and unoccupied, within the meaning of this condition, was the only question made by the defendant on trial. The trial court instructed the jury to find a verdict for defendant when the evidence was in, and a verdict and judgment were entered accordingly. Due motions were made and exceptions taken, and on appeal to the appellate court for the First district the judgment was affirmed. The plaintiff sued out this writ of error.

PHILLIPS, J.—Whether a building is vacant or unoccupied at the time a loss by fire occurs is a question of fact, for determination by the jury. What is meant by the term "vacant or unoccupied," as used in a policy, and its construction with other clauses, is a question of law. (Phœnix Ins. Co. v. Tucker, 92 Ill. 64.) The question of fact, depending on the preponderance of the evidence, is for the jury. Whether there is any evidence, legally tending to prove a fact, to authorize its submission to the jury, is to be determined by the court. (Bartelott v. International Bank, 119 Ill. 259.) Where the evidence is not sufficient to support a verdict for the plaintiff, or if one, if found, must be set aside, the court may direct the finding. Simons v. Chicago and Tomah Railroad Co., 110 Ill. 340.

An insurance policy will be liberally construed in favor of the assured, but construction will not make a new contract for the parties or disregard the evidence as expressed. The covenant in this policy that the premises becoming vacant and unoccupied would cause a forfeiture and avoidance, can on no principle of construction be made to depend upon the plaintiff's knowledge of the fact. In Moore v. Phœnix Ins. Co., 64 N. H. 140, it was held that a dwelling house in which no one lives, but in which a former occupant left some trifling articles of furniture of little value and of no use elsewhere, was vacant and unoccupied, within the meaning of the terms of the policy. To the same effect are Continental Ins. Co. v. Kyle, 9 L. R. A. (Ind.) 81, and Fischer v. Council Bluffs Ins. Co., 74 Iowa 676.

There is a strong authority in support of the rule that the meaning of the term "vacant or unoccupied" is that the house is without an occupant—that is, no one living in it. North American Fire Ins. Co. v. Zaenger, 63 Ill. 464; American Ins. Co. v. Padfield, 78 *id.* 167; Fitzgerald v. Connecticut Fire Ins. Co., 64 Wis. 463; Alston v. Old North State Ins. Co., 80 N. Car. 326.

The evidence in this record already shows the premises were vacant and unoccupied, within the meaning of the conditions of the

policy, and by the terms of the contract a forfeiture and avoidance resulted from that fact.

It was not error to instruct the jury to find for the defendant, and it was not error in the appellate court to affirm that judgment. The judgment of the appellate court is affirmed.

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§ 88.—Option to Terminate.

MORRISSEY v. BROOMAL ET AL.

1893. 37 Neb. 766, 56 N. W. 383.

RAGAN, C. J.—* * * Appellant contends, that notwithstanding the clause in the agreement reserved to appellees the right to terminate it on giving thirty days' notice, the contract could not, as a matter of law, be thus terminated. We do not so understand the law. When the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; and the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience. In Ireland v. Dick, 130 Pa. St. 299, 18 Atl. 735, the supreme court of Pennsylvania say: "The appellants accepted a license from the appellees for the manufacture of drilling jars. * * * The agreement was in writing; that is, it was a printed form, filled in as to names, dates, etc., in writing, and with the addition in the right-hand margin of the following stipulation: 'It is agreed by the parties of the first part that the parties of the second part can cancel this license by giving thirty days' notice in writing.' This portion of the instrument * * * is presumed to express the exact agreement of the parties upon the subject. Both of the parties acted under the agreement until December 19, 1878, when the licensees under the written clause * * * sent a notice to the licensors in the following terms: 'We wish to cancel our license concerning the manufacture of drilling jars * * * as per contract.' It is entirely clear that this letter was an absolute and complete rescission of the agreement."

The district court found that the appellant was not entitled to recover any damages from the appellees by reason of their having terminated the contract, and that finding is the next in order of appellant's complaints; and this claim for damages is based solely on the assumption that the appellees violated their contract with the appellant. But did they? The contract was terminated in accord-

ance with its provisions. There is no evidence tending to show that it was terminated by the appellees for a sinister purpose, nor that in exercising their right to terminate it they acted maliciously or arbitrarily. Indeed, the evidence would support a finding that the appellant's own violation of the contract afforded sufficient grounds for its termination by the appellees, had the contract by its terms required the existence of such grounds as a prerequisite to the right of the appellees to terminate it. The evidence shows that the appellees, however, in no respect violated either the letter or spirit of the contract; nor has the appellant sustained any damages by reason of its termination for which appellees can be made liable. The losses, if any, suffered by the appellant in consequence of the termination of the agreement, were such only as he must have known, when he signed the contract, might ensue if it should be terminated according to its provisions. * * *

CHAPTER X

DISCHARGE OF CONTRACT BY PERFORMANCE.

§ 89.—Performance in Accordance With Terms.

A contract may be discharged by performance in accordance with the terms thereof.

WHERE a promise is given upon an executed consideration, the contract is unilateral, and the performance of the promise discharges the contract. Where one promise is given in consideration of another, though performance by one party discharges him from further liabilities under the contract it does not release the other. In order that performance may operate as a discharge of both, each must have performed his part of the contract.

§ 90.—Modification of Performance.

A modification of the performance of a contract may be offered and accepted in satisfaction of the performance stipulated for, and be equally effectual in satisfaction and discharge of the contract.

As where under a contract for the sale and delivery of goods, a different mode of delivery is made and accepted by the parties.

Or where in the performance of a contract for the conveyance of a certain tract of land another tract is substituted by mutual agreement.

§ 91.—Payment.

Performance of a contract for the delivery of money only is called payment.

Payment by Negotiable Instrument.

CHELTENHAM STONE AND GRAVEL CO. v. GATES IRON WORKS.

1888. 124 Ill. 623, 16 N. E. 923.

IN this case appellee sold appellant machinery and merchandise and took from him the note of a third person and entered the amount thereof as a credit upon his books, and included the same in a subsequent statement of the account.

SHELDON, C. J.—This is an appeal from a judgment of the appellate court for the First district, affirming a judgment of the superior court of Cook county.

The case made by the evidence was this: Between March 19 and October 15, 1885, appellee, the Gates Iron Works, sold to appellant, the Cheltenham Stone and Gravel Company, machinery and merchandise to the amount of $3,940.97. Accounts were rendered monthly, and payments were made on account from time to time. During August, 1885, appellee received from appellant iron to the amount of $2,600, and a note, dated August 10, 1885, for $1,000, due in ninety days from said date, signed by the Cheltenham Improvement Company, payable to appellee. Both these items, the iron and the note, were credited appellant on appellee's books, and the statement of account rendered appellant on September 1, showed a credit of the two amounts, and the statement of account thereafter rendered started off with the balance after deducting these amounts. When the transactions for the season were closed, appellee's books showed an indebtedness against appellant of $145.97. This amount is conceded to be still due. Prior to the maturity of its note the Improvement Company had become insolvent, and the note was not paid. Appellee sued the Improvement Company on the note, and obtained judgment, but was unable to collect it. Then it brought this suit against appellant on the account, ignoring the credit it had given for the amount of the note, and on the trial tendered appellant an assignment of its judgment against the Improvement Company. Appellee recovered a verdict and judgment for $1,145.97, the full amount of its claim.

It is insisted that the presumption of law from these facts was that the note was taken in absolute payment, and as there was no evidence offered tending to rebut that presumption, appellee was, on the case made by it, only entitled to a verdict for $145.97, and that the court erred in not granting appellant's motion, made when the appellee rested its case, to direct the jury to find a verdict for appellee for $145.97, and also in not giving the following instruction asked by appellant, but refused, viz.:

"If the jury believe, from the evidence, that the note referred to was credited by the plaintiff to the defendant on the books of the plaintiff, and included as a credit in statements of account afterwards rendered by the plaintiff to defendant, then the presumption of law is that said note was received in payment, and the burden of proof is upon the plaintiff to show that such was not the intention of the parties at the time said note was given; and if the plaintiff has failed to show such intention that the same should not be received as payment, by a fair preponderance of testimony, the jury will find for the defendant on that issue."

Story, in his work on Promissory Notes, sec. 104, lays down the rule in this respect as follows: "In general, by our law, unless otherwise specially agreed, the taking of a promissory note for a pre-existing debt, or a contemporaneous consideration, is treated, *prima facie,* as a conditional payment only,—that is, as payment, only, if it is duly paid at maturity. But in some of the American states a different rule is applied, and, unless it is otherwise agreed, the taking of a promissory note is deemed, *prima facie,* an absolute payment of the pre-existing debt or other consideration. But in each case the rule is founded upon a mere presumption of the supposed intention of the parties, and is open to explanation and rebutter, by establishing, by proper proofs, what the real intention of the parties was; and this may be established, not only by express words, but by reasonable implication from the attendant circumstances." In Tobey v. Barber, 5 Johns. (N. Y.) 68, a note of a third person was given for rent due, and a receipt given for the rent. The note was not paid, the maker having become insolvent before the note became due. The court say: "The taking of the note was no extinguishment of the debt due for the rent. It is a rule, well settled and repeatedly recognized in this court, that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid, or unless the creditor parts with the note, or is guilty of *laches* in not presenting it for payment in due time." And it was held that the inference arising from the receipt was not enough to establish such a positive agreement. Johnson v. Weed, 9 Johns. (N. Y.) 310, is to the same effect,—a case where the note of a third person had been given in payment of a debt, and a receipt in full given. McIntyre v. Kennedy, 29 Pa. St. 448; Hunter v. Moril, 98 *id.* 13; Brown v. Olmstead, 50 Cal. 162, are authorities in support of the rule that taking the note of a third person for a pre-existing debt is no payment, unless it be expressly agreed to take the note as payment. The decisions in this state are essentially to the same effect. Walsh v. Lennon, 98 Ill. 27; Wilhelm v. Schmidt, 84 *id.* 185.

It is insisted, that although the acceptance of the note, merely, might not be payment, yet treating the note as payment, as was done here, by crediting it as payment on appellee's books and in statements of account rendered, shows that the note was taken in payment. We do not consider this any stronger evidence in that regard than were the receipts in full which were given in the cases cited from Johnson. In regard to the receipt in Johnson v. Weed, the court remarked: "It might still have been understood, consistently with the words of it (receipt), that the note was received in full, under the usual condition of its being a good note." And so in Brigham v. Lally, 130 Mass. 485, a case where such a note of a

third person had been taken on an open account and the debtor credited therewith, it was held that the trial court properly refused to rule that placing the note to the credit of the defendant upon the plaintiff's journal and ledger, and making no other appropriation of the money, was, in law, a payment. * * *

The judgment of the appellate court must be affirmed.

WHITBECK v. VAN NESS.

1814. 11 Johns. (N. Y.) 409.

SPENCER, J.—The single point for our determination in this case is, whether the note of a third person, agreed to be taken in payment for goods sold at the same time, is taken at the risk of the vendor of the goods, or of the vendee. I put out of consideration the allegation of fraud, for it was not proved; and I also lay aside the plaintiff's allegations, that the defendant had promised to indorse the note, as there was no proof of that fact. * * * In Bank of England v. Newman, 1 Ld. Raym. 442, and 12 Mod. 241, Lord Holt ruled "that if a man has a bill payable to him, or bearer, and he delivers it over for money received, without indorsement, this is a plain sale of the bill; and he who sells it does not become a new security;" otherwise, if he had indorsed it. This decision of Lord Holt is cited by Chief Justice Lee, in Hartop v. Hoare, 3 Atk. 50, with approbation. In Ward v. Evans, 2 Ld. Raym. 928, Lord Holt reiterates the doctrine, that taking a bill for goods sold is a payment, because it was part of the original contract; but that paper is no payment, where there is a precedent debt. In 12 Mod. 408 and 517, he again asserts the same doctrine. In Fydell v. Clark, 1 Esp. Cases 448, Lord Kenyon held that if a man, in the discount of notes, takes bills without indorsement, he must be considered as having taken the risk of payment on himself; that by not indorsing them, the defendant refused to pledge their credit and the persons receiving the bills took them on their own credit only.

The statute of Anne 5, 7, has interposed to regulate and fix the result of taking bills for a pre-existing debt. It provides that the acceptance of bills for a former debt shall be a complete payment, unless due diligence is used to obtain payment, and the bill be protested. In the very recent case of Emly v. Lye, 15 East. 12, Bayley, J., observes: "If a person buy goods of another, who agrees to receive a certain bill in payment, the buyer's name not being upon it, and that bill be afterwards dishonored, the person who took it cannot recover the price of his goods from the buyer, for the bill is considered as a satisfaction. * * *

The intrinsic circumstances of this case plainly show that the plaintiff considered himself as taking Deane's note at his own risk. It was made payable to the plaintiff himself, and the defendant, by not indorsing it, or guaranteeing the payment, clearly declined pledging his own responsibility. The offer was made by the defendant's agent of Deane's note for the horse; the plaintiff took time to consider whether it was advisable to take Deane's note, after deliberation, and, we must presume, too, after inquiry, agreed to sell the horse for the note. It appears to me we should be perverting the manifest agreement of the parties if we were to pronounce that the plaintiff did not take the note at his own hazard. To my mind, the nature and proof of this transaction furnish, as decisive proof, that the plaintiff was to take the note at his own peril, as if it had been stipulated in express terms.

In a few states it is held that taking a negotiable instrument in lieu of payment is *prima facie* an absolute discharge.

§ 92 (A)—Offer of Performance Not Accepted.

Where a promisor makes a proper offer of performance to the promisee and the offer is not accepted, the promisor is thereby discharged from liability on his promise.

THUS, in a contract to render services or for the sale of goods where the employer or buyer, notwithstanding a proper tender of performance, refused to accept the services or goods, the employe or seller is discharged by such a tender, and may either maintain or defend successfully an action for breach of the contract.

§ 92 (B)—Tender of Money.

Where the performance due consists in the payment of money a tender by the debtor does not of itself constitute a discharge of the debt.

IN order that the debtor may avail himself of a tender as a defense he must, from the time of making it, continue ready and willing to pay the debt, and if sued upon it must pay the money into court. The tender thus kept good puts a stop to accruing damages or interest for delay in payment, and if the debtor is sued, entitles him to judgment for his costs.

CHAPTER XI

IMPOSSIBILITY OF PERFORMANCE.

§ 93.—General Rule.

THE SHIP B. L. HARRIMAN, C. J. JANSEN, CLAIMANT, v. JOSEPH EMERICK.

1870. 9 Wall. (U. S.) 161.

THIS was a proceeding on a contract of affreightment where the destination of a cargo of coal, intended for the Spanish fleet, was the port of Valparaiso.

CLIFFORD, J.—* * * The ship proceeded to the Chincha Islands, and returned thence to San Francisco. Captain Swenson, in his protest, says that on the 4th of August he took a pilot on board and ran in near to the southernmost of those islands, and "lay in close to land." He went ashore, and learned that the Spanish fleet had hauled off from the Chilian coast, and gone upon an unknown destination. After diligent inquiry, he became satisfied that any attempt to find the fleet would be "impracticable and fruitless." He became satisfied also that it was necessary to return at once to San Francisco, and took his departure the same day on his return voyage. He considered his original voyage broken up by the withdrawal of the Spanish fleet, and the absence from Valparaiso of its commander, the consignee of his cargo. Upon the return of the vessel Emerick refused to pay the balance of the freight money. Jansen thereupon landed and sold the cargo. Emerick filed this libel, seeking thereby to recover back the freight money he had paid and the value of the cargo. The owner proved that at the time the charter-party was entered into, war existed between Spain and Chili; that the cargo was intended for the admiral of the Spanish fleet, then supposed to be operating against Valparaiso; that on the 24th of May the Spanish fleet left the coast of Chili and went to parts unknown, and did not return there. He proved by the master the facts stated in his protest and, further, that he was informed at the Chincha Islands of the bombardment of Callao by the Spanish fleet; that the fleet had been badly shattered, and had sailed away. The master feared his coal would be seized at the Chincha Islands, if

he betrayed the object of his voyage. The feeling there was very bitter. He believed the coal would have been instantly seized at Valparaiso.

Thus the case stood upon the proofs. The district court decreed for the owner. The circuit court decreed against him, and he has brought the case to this court for review. * * *

The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct and unconditional, that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial. If absent it was the right and duty of the master to place the cargo in store. Fisk v. Newton, 1 Denio (N. Y.) 45. The contract was not fulfilled. For this the shipper is in nowise responsible. Such are the relations of the parties.

The contract of affreightment is governed by the same principles as other special contracts. There are none to which these principles are more stringently applied. The contract is an entirety; and where there has been no complete fulfillment on one side, and no fault or waiver on the other, no freight money can be recovered. Mr. Justice Story says this is the result of all the cases. The Nathaniel Hooper, 3 Sumner (U. S.) 555.

In Paradine v. Jane, Aleyn 26, the court said: "When the party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have guarded against it by his contract." Such has always been the rule of the common law. If a lessee covenant to repair, and the house is burned down, he is bound to rebuild. If a party covenant to build a bridge and keep it in repair for a specified time, and it be swept away by an extraordinary flood before the time expires, he must replace it. A party agreed to secure in England for another the exclusive right to make, use and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an act of the British parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in Paradine v. Jane, and that the covenantor was liable for the breach of his agreement. Beebe v. Johnson, 19 Wend. (N. Y.) 500. If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void; but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain to-morrow, the contract will be upheld and enforced. Comyn, Digest 96; Rolle 420, l. 20.

The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. Touteng

v. Hubbard, 3 Bos. & P. 200. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance. 2 Pars. Cont. 672; Beebe v. Johnson, 19 Wend. (N. Y.) 500. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts—not to make or modify them. When there is neither fraud, accident nor mistake, the exercise of dispensing power is not a judicial function.

A charterer agreed to load a ship at Liebeau with barley. The ship went there to receive the cargo. The factors of the shippers informed the master that the Russian government had forbidden the exportation of barley, and that no loading could be furnished. The ship returned in ballast. The charterer was sued for breach of the contract. Lord Kenyon said: "I am decidedly against the defendant upon the point of law. It is said in Coke Littleton (1), that if a man be bound in an obligation to A, conditioned to enfeoff B, a stranger, and B refuses, the obligation is forfeited, for the obligor has taken upon himself to make the feoffment. The reason of this is clear. If a man undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply the settled principles of the law to the regulation of commercial dealings." Blight v. Page, 3 Bos. & P. 295, note.

A charterer covenanted to freight a ship at Gibraltar with a homeward cargo. A pestilent disease broke out there, and all public intercourse was forbidden by law. The cargo could not have been put on board without danger to all concerned of contracting and communicating the disorder. Lord Ellenborough said: "If, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages." Barker v. Hodgson, 3 Maule & S. 271.

An owner, by a charter-party, agreed that his ship could proceed from Liverpool to Terceira, and deliver her cargo. Terceira was under blockade, and both parties knew it. There was no intention to break the blockade. The ship did not go. The owner was held liable. The rule laid down in Paradine v. Jane was cited and approved. Medeiros v. Hill, 8 Bing. 235.

A ship was chartered to proceed from Charleston to Rotterdam. She went to London, and the master learned that if she proceeded to Rotterdam she would be liable to seizure there and on the way, and to confiscation, under a decree of the Emperor Napoleon, for having touched at a British port. The master refused to proceed,

and landed the cargo. Lord Ellenborough said: "Freight could only be earned by performing the terms of the charter-party." The goods "were brought here, instead of being conveyed to their port of destination." Osgood v. Groning, 2 Camp. 466. This case, in its essential points, is strikingly like the one under consideration.

In Lorillard v. Palmer, 15 Johns. (N. Y.) 14, the vessel sailed on a voyage from Richmond to New York. Finding the Chesapeake Bay blockaded so that it was impossible to proceed without capture, she returned to Richmond. It was held that the shipper was entitled to receive back his goods without paying any freight.

A ship was chartered for a voyage from the city of New York to the city of St. Domingo. The latter was found to be blockaded. The ship was turned away by a blockading vessel, and returned to New York. It was held that the charter-party was dissolved, "and all claim to freight under it gone." The court said: "Nor is this a case for *pro rata* freight. Here was no acceptance of the cargo at an intermediate port." It was added that the owner of the ship may make himself liable for freight by accepting the goods short of the port of destination, upon the grounds of an implied contract, resulting from the partial transportation of the goods and the benefit received. "But when the cargo, as in the present case, is brought back to the port of lading, no such presumption can arise. No benefit has accrued to the owner, nor has he done any act from which an implied contract to pay any freight can be raised." Scott v. Libby, 2 Johns. (N. Y.) 336; see also, Abbott, Ship. 596; Smith v. Wilson, 8 East 437; Liddard v. Lopes, 10 East 526; Benner v. Eq. In. Co., 6 Allen (Mass.) 222; Chase v. Alliance In. Co., 9 Allen (Mass.) 311; Atkinson v. Ritchie, 10 East 531; Vlierbroom v. Chapman, 13 M. & W. 230.

There is nothing in the record to excuse the conduct of the vessel, or to entitle the owner to any part of the stipulated compensation.

It is unnecessary to pursue the subject further.

We think the decree of the circuit court was in all things correct, and it is affirmed.

PHILLIPS v. STEVENS.

1819. 16 Mass. 238.

In this case the defendant, the lessee, covenanted to keep the demised premises in repair, and at the determination of the lease to surrender them in as good condition as they were in at the date of the lease. The buildings were destroyed by fire during the term without the default of the tenant.

PARKER, C. J.— * * * It was a matter of surprise a few years ago, that a lessee for years, who had covenanted to pay rent during the term, should be held to pay it after the buildings, which alone were valuable, were destroyed by fire. And yet nothing was more clear, than that he had stipulated so to do; as was found in the case of Fowler et al. v. Bott et al., 6 Mass. 63, referred to by the counsel for the plaintiff. So in the present case, although the defendant had, under his hand and seal, stipulated that he would keep in repair, support and maintain the fences and buildings, with the exception of natural decay, he was undoubtedly astonished at being called upon to rebuild a house, etc., the use of which he had enjoyed but for one year; and yet he has, in express terms, covenanted so to do. His excuse would be that he never read the covenants in his lease, or that he did not understand the force and effect of the terms. But the law does not protect men from their own carelessness or ignorance. The former they must cure; the latter they must provide against by asking counsel. Any lawyer, in any village of the commonwealth, could have stated the hazard, and would have guarded against it, by introducing such an exception, as is now generally adopted in mercantile contracts, "fire or other casualty excepted;" which would make the contract conformable to the intention of both the parties; as the words "dangers of the sea and inevitable accidents" do in a charter-party or bill of lading.

The case of Walton v. Waterhouse, 2 Saund. 422, and the cases cited by Sergeant Williams in his note (2) to that case, contain all the law upon this subject; the principle extracted from which is, "that although a man may be excused from a duty imposed upon him by the law, if he is disabled from performing it without any fault of his own; yet when, by his own contract, he creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." This doctrine is recognized and enforced in the case of Bullock v. Dommitt, 6 D. & E. 650, and in the case from our own reports, before referred to.

Men must be more cautious in making their contracts, and not rely upon the hardship of their cases to relieve them, when they are brought into difficulty. Such mistakes rarely occur in England, although there is a court of equity there which may sometimes relieve in such cases. With us there is no such authority. The law must have its course, and the citizens must take care of themselves in making their bargains.

STEES ET AL. v. LEONARD ET AL.

1874. 20 Minn. 494.

THIS action was brought to recover damages for a failure to erect and complete a building in accordance with certain plans and specifications. Defendant set up the existence of a latent defect in the soil rendering it unable to support the building.

YOUNG, J.—The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficutly short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified, liability. The law does no more than enforce the contract as the parties themselves have made it. Many cases illustrating the application of the doctrine to every variety of contract are collected in the note to Cutter v. Powell, 2 Smith, Lead. Cas. 1.

The rule has been applied in several recent cases, closely analogous to the present in their leading facts. In Adams v. Nichols, 19 Pick. (Mass.) 275, the defendant, Nichols, contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed, when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to perform the contract he had deliberately entered into. The court clearly state and illustrate the rule, as laid down in the note to Walton v. Waterhouse, 2 Wms. Saunders 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In School-Dist. v. Dauchy, 25 Conn. 530, the defendant contracted to build and complete a school-house. When nearly finished, the building was struck by lightning, and consumed by the consequent fire, and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this non-performance was not excused by the destruction of the building. The court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and

the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

School Trustees v. Bennett, 3 Dutcher (N. J.) 513, is almost identical, in its material facts, with the present case. The contractors agreed to build and complete a school-house, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the contract. When the building was nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pick-ax, and its defects were latent. The plaintiff had a verdict for the amount of the installments paid under the contract as the work progressed. The verdict was sustained by the supreme court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the court, the question is fully examined, many cases are cited, and the rule is stated "that where a party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. * * * If, before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has contracted to do it. * * * No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it or rather the law leaves it where the agreement of the parties has put it. * * * "Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defense, and overruled by the court."

In Dermott v. Jones, 2 Wall. (U. S.) 1, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay it was held that the owner might recoup the damages sustained by his deviation from the contract. The

court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted in vindication of the wisdom and justice of the rule which must govern this case. * * *

KENTZLER v. AMERICAN MUT. ACCIDENT ASSO.

1894. 88 Wis. 589, 60 N. W. 1002.

THIS was an action on a policy of accident insurance which provided that in case of death or injury notice of claim should be given to the secretary of the company immediately after the accident, and positive proof of death should be furnished within six months thereafter, as conditions precedent. The insured, a tug-boat engineer, disappeared on Nov. 9, 1892, and his body was found in the water near the tug-boat on Apr. 19, 1893, and notice of death was furnished May 26, 1893, and the proofs July 12, 1893.

CASSODAY, J.— * * * In the case at bar the contract must have a reasonable construction, and in view of the conditions so implied by law. What is the object of giving such notice of the accident, injury, or death? In case of an injury or disability, not resulting in death, such notice affords the association an opportunity to ascertain the exact condition of the person, and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is meant by giving notice "immediately after the accident occurs?" Does it mean, in the language of Webster: "In an immediate manner; without intervention of anything; without interval of time; without delay; instantly?" If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that: "The word 'immediately,' although in strictness it excludes all mean times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing." 9 Am. & Eng. Enc. Law 931, citing numerous English and American cases in support of the proposition. The same language is quoted approvingly by Ryan, C. J., speaking for the whole court, in constru-

ing the words "immediate delivery," as used in § 2310, Rev. St.; in Richardson v. End, 43 Wis. 318; Stevens v. Breen, 75 Wis. 599, 44 N. W. 645. Applying this rule to the case at bar, the word "immediately" must be construed to mean such convenient time as was reasonably requisite for doing the thing required. That is to say, upon the discovery of the death, notice thereof was to be given in such convenient time as was reasonably requisite for doing so under the circumstances mentioned; and the proofs were to be furnished within the six months specified after such discovery. Besides, it is a maxim that the law does not require impossibilities. Thus, in the language of Hennen, J., "where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Baily v. De Crespigny, L. R. 4 Q. B. 185. To the same effect, Taylor v. Caldwell, 3 Best & S. 826; Howell v. Coupland, L. R. 9 Q. B. 462, on appeal 1 Q. B. Div. 258; Insurance Co. v. Boykin, 12 Wall. (U. S.) 433. In the light of reason, as well as the authorities, we must hold that the action was not barred by the stipulation in the contract.

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§ 94 (A)—Performance Depending on Existence of a Specific Thing.

DEXTER v. NORTON.

1871. 47 N. Y. 62.

CHURCH, C. J.—The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market with the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the one hundred and sixty-one bales in question by the sellers before delivery. The title therefor did not pass to the vendee, but remained in the vendor. Joyce v. Adams, 8 N. Y. 291.

This action was brought by the purchaser against the vendor

to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a cerain thing not impossible or unlawful at the time, he will not be excused from the obligation of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident nor even those events denominated acts of God will excuse him, and the reason given is, that he might have provided against them by his contract. Paradine v. Jane, Aleyn, 26; Harmon v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

But there are a variety of cases where the courts have implied a condition to the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharged the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. 2 Smith Lead. Cas. 50.

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at an end." Benj. Sales, 424. In replevin for a horse and judgment of *retorno habendo,* the death of the horse was held a good plea in an action upon the bond. 12 Wend. (N. Y.) 589. In Taylor v. Caldwell, 3 Best & Smith, 836 A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts, and be-

fore the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In School District v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371, the defendant had agreed to build a school house by the 1st of May, and had it nearly completed on the 27th of April, when it was struck by lightning and burned; and it was held that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject matter of the contract, and this is the rule of the civil law. Pothier Con. Sale, Art. 4, §1, p. 31. We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognize such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer did, protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can, of course, always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the consideration urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved.

WALKER ET AL. v. TUCKER ET AL.

1873. 70 Ill. 527.

IN this case, appellants, the lessees of a coal mine, covenanted, by the terms of their lease, to work the same, during the continuance of their lease, in a good and workmanlike manner. The coal mine became exhausted.

SCHOLFIELD, J.—* * * The appellants are expressly bound by their covenant, "to work the said coal mine during the continuance of this lease and agreement in a good and workmanlike manner." It was incumbent on appellants to know, and the presumption is they did know, when they made this covenant, the difficulties to be encountered in performing it. It is elementary law that, when the contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. 1 Chitty on Conts. (11 Am. ed.) 1074.

But where, from the nature of the covenant, it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance became impossible from the perishing of the person or thing, that shall excuse such performance. *Id.* 1076.

If, therefore, the coal mine was exhausted, the appellants were excused from further working it. * * *

SHAWMUT NATIONAL BANK v. BOSTON.

1875. 118 Mass. 125.

MORTON, J.— * * * The case presents the question as to the rights of the lessees where different rooms in the same building are leased to different tenants, and the whole building is destroyed by fire.

In Stockwell v. Hunter, 11 Met. (Mass.) 448, this question was carefully considered. In that case the tenant had a lease of the cellar and basement story of a building three stories high, each story being occupied by seperate tenants, his lease containing no stipulations as to rebuilding in case of fire, and it was held that the destruction of the building terminated the interest of the lessee in the premises. This was upon the ground that such leases of distinct rooms do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased, and that the destruction of the principal thing leased necessarily terminated the lessee's interest therein. This decision has been followed in Graves v. Berdan, 26 N. Y. 498; Ainsworth v. Ritt, 38 Cal. 89, and McMillan v. Solomon, 42 Ala. 356. * * *

ANGUS v. SCULLY.

1900. 176 Mass. 357, 57 N. E. 674.

HAMMOND, J.—The contract was that the plaintiffs should move a large building belonging to the defendants from a lot on Third street to a lot on First street, and also change the location of two other buildings, of which one was on the First street lot, and one on the Third street lot; and the defendant was to pay them $840. In accordance with the agreement the plaintiffs began the work. "They first moved the house on the Third street lot, and then began to move the large building from the Third street lot across certain open lots towards the lot on First street. When said last-named building had been moved about half the distance to said lot on First street it was entirely consumed by fire at some time during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings." In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire. The court refused to rule as requested by the defendant, that the plaintiffs could not recover, and submitted the case to the jury upon instruc-

tions which would authorize them to find for the plaintiffs if they were satisfied that the fire was not attributable to any negligence of the plaintiffs. We see no error in the rulings under which the case thus went to the jury. Clearly, one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building, the work could not be completed according to the contract. Authorities differ as to the rights of the parties in such a case, but so far as respects this commonwealth the rule is well settled. As stated by Knowlton, J., in Butterfield v. Byron, 153 Mass. 517, 523, 27 N. E. 669, 12 L. R. A. 573: "The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them; the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable." Stated more narrowly, and with particular reference to the circumstances of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done. This case comes clearly within this rule. Lord v. Wheeler, 1 Gray (Mass.), 282; Butterfield v. Byron, *ubi supra,* and cases therein cited.

In Illinois liability for the part performance seems to depend upon whether the contract is entire or severable.

Thus, where the contract was to place a ventilating system in a building for a lump sum, payment to be made thirty days after acceptance of the work, and the building was destroyed by fire without the fault of either party before the contract was fully performed, it was held that the contract was entire and that no recovery could be had for the part performance.

Huyett & Smith Co. v. Edison Co., 167 Ill. 233, 241, 47 N. E. 304.

But where payments were to be made by installments as the work progressed the contract has been held to be severable.

Siegel, Cooper & Co. v. Eaton & Prince Co., 165 Ill. 550, 558, 46 N. E. 449.

§ 94 (B)—Performance Depending on Personal Capacity of Promisor.

SMITH v. THE ESTATE OF PRESTON.

1897. 170 Ill. 179, 48 N. E. 688.

PRESTON had agreed to manufacture a patented article and "push the sale" thereof "by advertising, exhibiting and soliciting trade" by salesmen and other employes, and to use his "best efforts to create a large demand and a heavy sale of this article."

CARTER, J.— * * * Was this contract with Preston one of a personal character, which was terminated by his death? That contracts of a strictly personal nature terminate upon the death of the party by whom the personal service is to be performed, and that in such cases the executors or administrators are not liable for the performance of the contract, is a well settled rule of law. (1 Parsons on Contracts, 131; Addison on Contracts, Sec. 396; Bishop on Contracts, Sec. 600.) The only difficulty arises in determining whether or not a contract comes within the rule. As said in Shultz v. Johnson, 5 B. Mon. (Ky.) 497, this rule "is not defined and limited in the books with such precision as to render it always easy to determine whether particular cases fall within it or not." Any contract from which it appeared that it was the intention of the parties that the service should be performed by the contractor in person alone, would terminate with his death. (Janin v. Browne, 59 Cal. 44.) Where distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract. The whole question in each case is one for construction, and depends upon the intention of the parties. (Billings' Appeal, 106 Pa. St. 558.) In contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent the parties contracted upon the basis of the continued existence of the particular person or chattel. Yerrington v. Greene, 7 R. I. 589; 84 Am. Dec. 578, Taylor v. Caldwell, 3 B. & S. 826; 113 E. C. L. 826.

In Smith v. Wilmington Coal Mining and Manf. Co., 83 Ill. 498, this court said: "Text writers, noting the decisions on this subject, state the law to be, that when the contract with the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all that deceased could have done, he may do so, and enforce the contract. (1 Parsons on Contracts, 6th

ed., p. 131.) Common law authorities sustaining the doctrine are: Saboni v. Kirkman, 1 M. & W. 418; Wentworth v. Cook, 10 A. & E. 42. Exceptional cases are, when the contract is of a personal character, or requires, in its execution, the exercise of peculiar skill or taste."

In Marvel v. Phillips, 162 Mass. 399, the plaintiff, having invented an improvement in conveyors and an improved elevator, assigned his invention to Phillips, the defendant's testator, taking from him an agreement in writing, by which Phillips agreed to manage the business for the joint benefit of both, to advance all funds requisite, and "to use all reasonable efforts to increase and supply the demand for the Marvel elevator and conveyor—that is, to do all things which a wise and energetic owner of said patents, with ample financial ability, ought to do," and in a later clause bound himself and his legal representatives to Marvel and his legal representatives. The court held that the agreement was discharged by the death of Phillips, saying: "The chief undertakings were personal in their character. He was to endeavor to create a profitable business under the patents, and to manage it, to advance funds, for the repayment of which he was to look solely to the business, to use all reasonable efforts to increase and supply the demand for the elevator and conveyor, and to do all things which a wise and energetic owner of said patents, with ample financial ability, ought to do. This implies personal skill, attention and ability of a high order. * * * The different parts of the agreement are not separable. * * * A contract to render such services and to perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death, or a disability which renders performance impossible, discharges the contract. Neither Phillips nor his estate is bound to furnish a substitute, nor is the plaintiff bound to accept one." See, also, Home Sewing Machine Co. v. Rosensteel, 24 Fed. 583.

In Oliver v. Rumford Chemical Works, 109 U. S. 81, there was an agreement by Morgan, for the use of whose administratrix this suit was brought by the Rumford Chemical Works, that he would manufacture their self-raising flour, and that he would use all his business tact and skill, and all other means necessary, to introduce and sell the same, and to make the sale thereof as large as in any way possible during the continuance of his license, and in case he failed to perform his covenants the Rumford Chemical Works reserved the right to revoke the license and terminate the agreement. Morgan died soon after. Mr. Justice Blatchford, in delivering the opinion of the court, said: "The right is granted to Morgan alone—to him personally—with an agreement by him that he will enter on the manufacture of the self-raising flour, and that he will use all his business tact and skill to introduce and sell the flour. It is apparent that licenses of this character must have been granted

to such individuals as the grantor chose to select because of their personal ability or qualifications to make or furnish a market for the self-raising flour, and thus for the acid, all of which was to be purchased from the grantor. The license was made revocable by the grantor on the failure of Morgan to perform his covenants and agreements. We have not overlooked the fact that the privilege granted to Morgan was to continue for five years. This means no more than that he was to have it for five years, if he should live so long and if the patent should not have expired. But it cannot have the effect to impart assignability to the privilege, or to prolong its duration beyond that of his life." * * * Preston agreed to use his best efforts to create a large demand and a heavy sale of this article. No difference is perceived between this obligation and the ones assumed in the cases cited above, and this cannot be held to be such a contract that an executor would be bound to carry out. * * *

WOLFE v. HOWES.

1859. 20 N. Y. 197.

ALLEN, J.— * * * The question is presented whether the executor of a mechanic, who has contracted to work for a definite period, and who enters upon his labors under the contract, and continues in its faithful performance for a portion of the time, until prevented by sickness and death, and without any fault on his part, from its final completion, can recover for the work and services thus performed by his testator.

The broad ground is taken on the part of the defendants' counsel that no recovery can be had under such circumstances; that full performance was a condition precedent to the right of recovery, the agreement being general and absolute in its terms, and not providing for the contingency of sickness or death.

It has undoubtedly been long setttled as a general principle, both in England and in this as well as in most the other States, that where the contract is entire, nothing but the default of the defendants will excuse performance. It will be found, however, on an examination of the leading cases in our own courts, that the failure to perform was owing to the fault or negligence of the party seeking to recover. (McMillan v. Vanderlip, 12 Johns. (N. Y.) 165; Reab v. Moor, 19 *id.* 337; Jennings v. Camp, 13 *id.* 94, *id.* 390; Sickels v. Pattison, 14 Wend. (N. Y.) 257; 8 Cow. (N. Y.) 63, and various other cases.) It is believed that not a single case can be found where the rule is laid down with such strictness and severity as the defendants' counsel asks for in the present case.

Some of the English cases do indeed rather intimate such a doctrine. (Cutter v. Powell, 6 T. R. 320, 8 *id.* 267; Appleby v. Dods, 8 East 300; Hulle v. Heightman, 2 *id.* 145 and some others.) These cases are, however, capable of the same reasonable construction which the law confers upon all contracts. That of Cutter v. Powell is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life and to render at all hazards his personal services during the voyage, before the completion of which he died.

The great principle upon which the adjudged cases in all the courts is based is the question, as stated in McMillan v. Vanderlip, already cited. What was the real intention of the parties? The law gives a reasonable construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding upon the plaintiff's testator in case of unavoidable sickness or death; or did they intend, and is it to be implied, that each should perform, as to the other, according to the terms of the contract, *Deo volente?* It appears that a fair and legal interpretation would answer this question in the affirmative, and that such a provision must be understood as written in the contract. * * *

There is good reason for the distinction which seems to obtain in all the cases, between the case of a willful or negligent violation of a contract, and that where one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while, in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance.

There is another reason for relaxing the rule, which is applicable to the case we are now considering. It is well set forth in Story on Bailments (§ 36, and notes), where that learned jurist, after considering the great number of cases on this subject in the various courts of England and this country, and well observing that they are not at all times in harmony, remarks that the true rule may be considered to be, "that where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the non-performance, and enable the party to recover upon a *quantum meruit*. But where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor." In the present case the finding shows, and I have already remarked, justly, that the contract was personal, and that the executor could not have employed a third person to execute the contract on the part of his testator. * * *

§ 94 (C)—Performance Becoming Impossible by Law.

HEART v. EAST TENNESSEE BREWING CO.

1908. 121 Tenn. 69, 113 S. W. 364.

SHIELDS, J.—Complainant on August 31, 1902, leased a certain house and lot situated in Knoxville, Tenn., and owned by him, to the defendant for a term of eight years, to be used as a saloon or place for the sale of intoxicating liquors, as expressed in the written lease that day made and executed by both parties. The defendant entered into possession of the property, and paid the rent contracted for to November, 1907, but after that declined to further use it, or to pay any rent. Complainant sues to collect rent accruing since November 1, 1907. The contract of lease was exhibited with and made a part of the bill, and therein the terms of the contract and the purposes for which the property was to be used are fully set forth.

The chancellor sustained a demurrer to the bill upon the ground that by chapters 17, 206, 207, pp. 81, 752, 755, Acts Gen. Assem. 1907, the sale of intoxicating liquors was made unlawful and prohibited in the city of Knoxville from and after November 1, 1907, and therefore the purpose for which the lease was made was from that time illegal, and the contract void and unenforceable, and the complainant has brought the case to this court for review.

There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased—the sale of intoxicating liquors in Knoxville—was lawful, and the lease valid and enforceable. Afterwards, November, 1, 1907, that purpose was made unlawful by the acts of the General Assembly above referred to, and thus by operation of law the lease became and is void and unenforceable at the instance of either party.

It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality and public policy. * * *

The rule is the same when the purpose of the contract, although lawful when made, becomes unlawful by statute enacted before the full performance of its terms. In Mr. Parson's work on Contracts (volume 2, p. 674) it is said:

"That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may indeed be regarded as an impossibility by act of law; and it is put upon the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or in other words, to require him to do that which it forbids his doing. Therefore, if one agrees to do a thing which is lawful for him to do, and it becomes unlawful by an act of the Legislature, the act avoids the promise, and so if one agrees not to do that which he may lawfully abstain from doing,

but a subsequent act requires him to do, this act also avoids the agreement."

In Hammon on Contracts, § 210, pp. 345, 346, it is said:

"Where the performance of an executory agreement which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved and the parties discharged from its obligations."

Other text-books are to the same effect. Clark on Contracts, 681; Lawson on Contracts, §§ 423, 424. * * *

The case of Gray v. Sims, Fed. Cas. No. 5729, is directly in point. This was a suit upon a policy of marine insurance. The vessel insured was to be employed in importing goods from Calcutta or Madras into the United States, and the contract of insurance specified this as one of the purposes of the voyage. After the policy was written, and before the return of the vessel, it became by act of Congress illegal to import goods into the United States from those points. The master undertook to do so, and the ship was seized and confiscated. The loss was within the terms of the policy. A recovery was denied. The court said:

"But if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both of them discharged from its obligation. The insured loses his indemnity and the insurer his premium."

Other cases in accord are: Sauner v. Phœnix Insurance Co., 41 Mo. App. 480; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Jamieson v. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Presb. Church v. New York, 5 Cow. (N. Y.) 538.

It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the purpose of both lessor and lessee, as clearly expressed in the instrument, that it should be used as a saloon, and, this being made unlawful by law, the contract is no longer enforceable.

The decree of the chancellor is affirmed, with costs.

GATES, WOOD & McKNIGHT v. JAMES L. GOODLOE, EX'R OF R. C. BRINKLEY.

1880. 101 U. S. 612.

HARLAN, J.— * * * The action of the military authorities in seizing the rents arising from the property which Brinkley had leased to Gates, Wood & McKnight not being, then, in violation of law—that which was done being regarded as having been done by

the authority of the United States in lawful defense of the national existence against armed insurrection; it results, necessarily, as we think, that the lessees, when dispossessed by military authority and deprived of all future use and control of the leased property, were discharged from liability to the lessors for rent accruing during, at least, the period of such dispossession. They were not discharged from liability for rent which previously accrued. But since the consideration for their promise to pay rent, from time to time, was the possession and use of the leased property during the term and upon the conditions specified in the lease, and since such enjoyment and use were materially interrupted and prevented by the interference of the law, or of lawful public authority, to which both parties were amenable, the lessees, it seems to the court, ought to be protected against liability for the rent stipulated in the contract of 1859, for the period they were thus kept out of possession and enjoyment of the property. The events and contingencies causing that result were not such as the parties anticipated, nor such as we can suppose were in contemplation when the contract was made. Otherwise they would, it must be assumed, have been provided for in the contract.

The conclusion thus reached is abundantly sustained by authority. Indeed, many of the authorities would justify us in holding the action of the military authorities to have worked the dissolution of the entire contract of lease from the moment the lessees were dispossessed.

In Melville v. DeWolf, 4 El. & Bl. 844, the plaintiff sued for wages agreed to be paid to him as a mariner and carpenter on board of a foreign ship going to the Pacific Ocean. In the course of the voyage, complaint was made to a British consul, at a foreign port, of an offense alleged to have been committed by the master of the ship. The consul, in pursuance of a British statute, and having power and jurisdiction so to do, caused the master to be conveyed to England, under restraint, to be there proceeded against in respect of the offense charged; and the consul, having power and jurisdiction so to do, caused the plaintiff to leave the ship, and proceed to England as a witness. The latter did not return to the ship, or render any further services thereon for the defendant. The question in the case was as to the liability of the defendant for wages according to the articles signed, for the period subsequent to the departure of the plaintiff for England under the direction or order of the consul. The Court of Queen's Bench, speaking by Lord Campbell, C. J., said: "The money paid into court covered the plaintiff's demand for wages during the whole time that he had served on board the ship; and we think that, upon the facts proved, the ship-owners were not liable to pay him wages for a longer period. By authority of the British legislature he was then separated from the ship at a foreign port and sent to England, without any reasonable possibility of his ever being able to rejoin the ship during the voyage in

which he was engaged. No blame is to be imputed to him, and there has been no forfeiture of wages; but he cannot be considered as having earned the wages in dispute. After he was sent home from Montevideo to England, he neither served under the articles actually or constructively; and as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must then be considered as dissolved by the supreme authority of the state, which is binding on both parties." Again: "Then an act being done by public authority, which rendered any further performance of the contract impossible, we think that the contract was dissolved."

Esposito v. Bowden, 7 El. & Bl. 763, has some bearing upon the question. Bowden, a British subject, contracted to make a voyage to Odessa, a Russian port, and bring from there goods belonging to the other contracting party. Before the voyage was completed, war between England and Russia intervened. Bowden thereupon declined to execute the contract, and was sued for damages for failing to do so. The Court of Queen's Bench said: "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at the time it is declared, and of which it makes the further execution unlawful and impossible, the authorities establish that the effect is to dissolve the contract, and to so absolve both parties from further performance of it."

The same doctrine was announced in Barker v. Hodgson, 3 Mau. & S. 267, where Lord Ellenborough said: "If, indeed, the performance of this covenant has been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he has thus been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable in damages."

In his treatise on the law relative to Merchant Ships and Shipping, 11th ed., by Shee, 453, Lord Tenterden says: "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved."

To the same effect speak Chancellor Kent, 3 Kent 248, and Mr. Chitty in his treatise on Contracts, 11th Am. ed., 1077. The last named author says: "So the non-performance of a contract will be excused where such non-performance is occasioned by an act done by public authority."

Further citation of authorities would seem to be unnecessary. The reasons assigned in the adjudged cases and by elementary writers, in support of the principles announced in the foregoing authorities, apply to this case and should control its determination. The lessees having been permanently deprived, by competent public authority, of the possession of the leased property, the use of which

was the sole consideration for the notes sued on, they were discharged from liability upon the notes, which represented the rents accruing during the period of military occupancy and control.

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§ 95.—One of Two Modes of Performance Becoming Impossible.

DRAKE v. WHITE ET AL.

1875. 117 Mass. 10.

IN THIS case defendants gave a receipt for a safe taken by them as collateral security for the plaintiff's debt in which they promised, on payment of the debt, to deliver the safe to the plaintiff, or its equivalent in money. The safe, while in possession of defendants was destroyed by fire without their fault.

AMES, J.—This is a case of a deposit of personal property by a debtor in the hands of a creditor as collateral security for the debt. If it presented merely the ordinary incidents of a pledge, it would be manifest that the action could not be maintained. The destruction of the property is conceded to have been accidental, without fault or neglect of duty on the part of the defendants.

But the claim of the plaintiff is, that the transaction differs widely from an ordinary pledge, and he contends that, by the terms of a written contract, the defendants have taken upon themselves a special liability of a much more extensive character. If, in the common case of a pledge, the common law contract were reduced to writing, it would contain among other things a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things; either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the parties might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and if the parties have improvidently made their contract more onerous than they

expected, the difficulty cannot be removed by a violation of those rules.

It is said that the written instrument declared upon is a receipt, and as such is open to explanation. It is true that it is a receipt, but it is also a promise clearly expressed. Brown v. Cambridge, 3 Allen (Mass.) 474. We see no way to avoid the conclusion that the plaintiff's construction of that promise is correct. The difficulty with the defendants' case is, that, although their purpose was to take collateral security for a debt, the terms in which they have expressed themselves as to what they are to do with the pledge on the payment of the debt contain a positive and unequivocal promise either to return it, or to pay an equivalent. The fact that one part of this alternative promise has become impossible of fulfillment does not relieve them from the other. Chit. on Con. (11th Am. ed.) 1061; Stevens v. Webb, 7 C. & P. 60; State v. Worthington, 7 Ohio 171.

CHAPTER XII

DISCHARGE OF CONTRACT BY OPERATION OF LAW.

Discharge of a contract by operation of law and without reference to the intention of the parties may occur
By Merger;
By Alteration of a Written Instrument;
By Bankruptcy.

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§ 96.—Merger.

COSTNER v. FISHER.

1889. 104 N. Car. 392, 10 S. E. 526.

THE plaintiff brought his action before a justice of the peace, for the recovery of $135.35 due by account and note under seal. When the cause was called for trial the plaintiff entered a *nolle prosequi* as to the cause of action upon the note. The plaintiff testified in substance that the bond was given for the amount due upon the account, and that he accepted it on condition that the defendant would pay him $10 a month; that the bond was intended merely as a security; and that he did not receipt the account. The court held that "the cause of action upon the account was merged into the note, and that, the same not being due, the plaintiff could not recover." There was a verdict for the defendant, and the plaintiff appealed.

SHEPHERD, J.—His honor was clearly right in holding that the account was merged in the bond. Gibson, C. J., in Jones v. Johnson, 3 Watts & S. (Pa.) 277, says: "Extinguishment by merger takes place between debts of different degrees, and lower being lost in the higher; and, being by act of the law, it is dependent on no particular intention. * * * No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing *in rem judicatum*. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt, by the same debtor; for to allow a debt to be at the same time of different degrees, and recoverable by a multiplicity of inconsistent remedies,

would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions," etc. This high authority fully sustains the ruling of his honor.

Even if there were no merger, the taking of the bond payable at a certain time implies an agreement to suspend his remedy on the account for that period. 2 Daniel, Neg. Inst., § 1272; Putnam v. Lewis, 8 Johns. (N. Y.) 389; Frisbie v. Larned, 21 Wend. (N. Y.) 450, and other cases cited in Bank v. Bridgers, 98 N. Car. 67, 3 S. E. 826. There is no error.

HILL v. BEEBE.

1856. 13 N. Y. 556, 567.

IN THIS case a chattel mortgage was given to secure a debt evidenced by the note of the mortgagor, and thereafter the note was surrendered, and a new note given for the amount of the first, and a few dollars of book account in addition, and a second mortgage was executed on the same property to secure the amount.

WRIGHT, J.— * * * The taking of a new mortgage to secure the same debt and a surrender of the old note was no satisfaction or extinguishment of the original debt; nor by a surrender of the note was the first mortgage annihilated. The mortgages were but collateral securities for the debt. The debt was not paid, and until that was done all collateral securities should stand. (Butler v. Miller, 1 N. Y. 500; Gregory v. Thomas, 20 Wend. (N. Y.) 17.) A subsequent security for a debt of equal degree with a former, for the same debt, will not by operation of law extinguish it. (Manhood v. Crick, Cro. Eliz. 716; Higgens' Case, 6 Coke 45; Gregory v. Thomas, 20 Wend. (N. Y.) 17; Phelps v. Johnson, 8 Johns. (N. Y.) 54; Preston v. Perton, Cro. Eliz. 817; Mumford v. Stocker, 1 Cow. (N. Y.) 178; Cornell v. Lamb, 20 Johns. (N. Y.) 407; Enes' Case, Litt. 58.) In this case it was not pretended that the debt was paid by the giving of the second mortgage. The most that is claimed from the transaction is that it was equivalent to a payment of the first note, and that being satisfied and surrendered up, the mortgage, which was but an accessory or incident to the debt, was annihilated by such payment. But the difficulty is that the mortgage was a security for the debt and not for the note, which was merely evidence of the debt and not the debt itself. Surrendering the old note and taking a new one could not be a satisfaction or payment of the debt, and the mortgage, being a security for the latter, would not be extinguished short of such payment. The debt was not merged in the first note, so that, by operation of law, the note being surrendered and a new one substituted, the debt was satisfied. The trans-

action was but taking another security, of equal degree with a former one, for the same debt, which had not the legal effect to extinguish the first. * * *

WITZ ET AL. v. FITE ET AL.

1895. 91 Va. 446, 22 S. E. 171.

BUCHANAN, J.— * * * The question raised by the pleadings filed and offered to be filed in the cause is whether a simple contract debt is merged into a higher security given for the same debt to the same creditor by a portion of the same debtors, although it was agreed by the parties, when given, that the higher security should be taken only as a further or collateral security, and not in satisfaction of the simple contract debt.

The counsel of the defendants insist that the question of merger cannot be controlled by the intention or agreement of the parties, but results by operation of law from their acts, without regard to intention.

In general, a simple contract is extinguished by a specialty security for the same debt, if the remedy upon the latter is co-extensive with that which the creditor has on the former.

This question has been much discussed in England and in this country, but the weight of authority is in favor of the doctrine that if the higher security shows upon its face that it was executed for the same debt as the simple contract, and shows further that it was not taken in satisfaction of the simple contract but in addition to or collateral to it, there is no merger. If the higher security shows upon its face that it was executed for the same debt as the simple contract, and nothing more appears, the presumption is—at least, of fact—that it was in satisfaction of the simple contract, and that the latter is merged into it. 2 Chit. Cont. (11th Am. ed.), pp. 1160-1161, 15 Am. & Eng. Ency. Law 357; 1 Smith, Lead. Cas. (8th Am. ed.), pt. 1, p. 663; 3 Minor, Inst. (class ed.) 142; Commissioner of Stamps v. Hope (1891), App. Cas. 476, 483; Butler v. Miller, 1 Denio (N. Y.) 407; Wallace v. Fairman, 4 Watts (Pa.) 378, 380; 5 Lawson, Rights, Rem. & Prac., § 2580; Graves v. Allen, 66 Texas 589, 2 S. W. 192.

But in this case the higher securities which are copied into the replications offered do not show that they were executed for the same debts as the notes sued on, nor do they show that they were accepted by the plaintiffs as additional or collateral securities to the notes. * * *

DAVIS v. ANABLE & FIDLER.

1842. 2 Hill (N. Y.) 339.

BRONSON, J.—It is difficult to say whether the defendants intended to set up the bond or judgment, or both of them together, as an extinguishment of the simple contract debt; and it is not important to inquire what was their meaning, for neither the bond nor the judgment, nor both of them together, constitute a good bar to this action. The bond was not between the same parties that are now before the court; and it was not given for this debt alone, but included other demands. It was evidently intended as a collateral security for the debts included in it; and such a security, though of a higher nature, does not extinguish a simple contract debt. The fact that the bond has been carried into judgment, adds no force to the defense. There is no averment that either the bond or the judgment was accepted in satisfaction of this debt, or that they have produced satisfaction. Day v. Leal, 14 Johns. (N. Y.) 404; Drake v. Mitchell, 3 East 251. And see, Jackson v. Shaffer, 11 Johns. (N. Y.) 513; Shaw v. Burton, 5 Mo. 478. * * *

Judgment for plaintiff.

REES ET AL. v. LOGSDON ET UX.

1887. 68 Md. 93, 11 Atl. 708.

STONE, J.—In May, 1883, the appellants were the owners of a saw-mill, and the appellee the owner of a tract of timber land in Allegany county. In that month they entered into the following agreement:

"This agreement, made this seventh day of May, 1883, between Joseph Logsdon, of Allegany county, Maryland, and Burkhiser & Rees, of Mineral county, West Virginia. The parties of the second part do agree to move the saw-mill on the property of the party of the first part, in Allegany county, Maryland, on or before the tenth day of June, 1883; and the said party of the second part agrees to saw said Logsdon's timber for four dollars per thousand feet; and the said party of the second part does agree to take all the sawing out in lumber, that is, such lumber as is suitable for wagon stuff, cut according to dimensions given. Said Logsdon does agree to furnish the lumber at $16 per thousand, delivered at the factory of Germond, Rees & Co., in Keyser, West Virginia. The said Logsdon further agrees to keep the mill in logs as far as possible; and the party of the second part agrees to saw good lumber. And the parties of the second part do further agree that the party of the first part can have the privilege of taking the mill at $1,400, and pay for

it all in lumber at $16 per thousand, delivered at the factory of Germond, Rees & Co., in Keyser, West Virginia.

"Witness our hands and seals this the seventh day of May, 1883.

(SEAL.) "BURKHISER & REES.

(SEAL.) "JOSEPH LOGSDON."

Soon after the saw-mill was moved on the land of Logsdon, the appellee, he exercised the option given him under the agreement, and purchased the mill. Security was demanded by the appellants, and Logsdon and wife executed a mortgage to the appellants to secure the sum of $1,400. The mortgage itself is in the common form, and makes no allusion to the agreement or for what it was given except that it recites an indebtedness on the part of Logsdon to the appellants in the sum of $1,400. There is, however, no doubt whatever that this mortgage was given to secure the payment for the mill. On that point there is no conflict in the evidence. The appellants subsequently filed a bill to foreclose the mortgage, and the defense set up by the appellee is that, by the agreement under which he purchased the mill, he was to pay for it in lumber, and that he began his payments and continued them until the appellants refused to receive any more lumber, and so the matter rested until suit was brought.

The substantial question in the case is, therefore, whether the agreement is merged in the subsequent mortgage, or whether the mortgage was taken merely as collateral security for the performance of the agreement. There is no doubt that the acceptance of a security of a higher nature in lieu of or in satisfaction of one of an inferior nature operates as an extinguishment or merger of the latter; but where such security is accepted merely as an additional or collateral security for a pre-existing debt, it is equally clear that the doctrine of extinguishment or merger does not apply. Brengle v. Bushay, 40 Md. 141, and the cases there cited. The question whether the mortgage in this case was taken merely as collateral security is therefore one of fact, and the burden of proof is upon the appellee to show that such was the case. Taking the whole evidence, we think the appellee has made out his case with reasonable certainty. * * *

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§ 97.—Alteration of a Written Instrument.

SMITH v. MACE.

1863. 44 N. H. 553.

BELLOWS, J.—The principal question in this case arises upon the instructions to the jury, that although the notes given for the price of the land would be rendered void by fraudulent alteration, yet the

debt would still remain, and the plaintiff might recover upon the general count. * * *

In the case of such an alteration the policy of the law makes the note wholly void, upon the ground stated in Master v. Miller, 4 D. & E. 345, that "a man shall not take the chance of committing a fraud, and, when the fraud is detected, recover on the instrument as originally made." This sound and salutary principle, based as it is upon high moral considerations, and long and well established in both the English and American courts, would be rendered entirely inert in respect to the original promisee, if, when detected in the fraudulent alteration of the written promise, he might recover, upon a promise implied by law, the amount of the original obligation. It would in fact be changed into a mere technical objection to the form of the action, which is utterly inconsistent with the policy which dictated it.

These views are fully sustained by the well considered case of Martendale v. Follet, 1 N. H. 95, which is often cited, and, so far as we have observed, never questioned. The same doctrine is fully recognized in Wheelock v. Freeman, 13 Pick. (Mass.) 165. In both these cases notes were given for the price of property sold, and payable, the former in merchantable neat stock, and the latter in stock in one year, or money in two. In both the alterations affected the mode of payment, and in both it was decided that no recovery could be had upon the original consideration.

In Arrison v. Harmstead, 2 Pa. St. 191, there was a deed of land, reserving rent, and after the delivery, it being in the hands of the scrivener, it was altered by the grantor; held, in an action for the rent, with counts for use and occupation, etc., that the plaintiff could not recover, either on the deed or for use and occupation; for, although the land passed by the deed, the estate of the grantor was destroyed, as a penalty for the fraud in making the alteration. The case is well considered, and the court say: "If a bond, note, or other instrument for the payment of money be altered, and thereby avoided by the obligor, it has never been suffered, or even attempted to recover on the original contract; as, for example, for money lent. It is a mistake to suppose the evidence of title only is avoided. The whole contract becomes void, and it is held, as a principle of policy, that the fraudulent party may lose, but can gain nothing by his fraud." See also Miller v. Gilleland, 19 Pa. St. 119.

In White v. Hass, 32 Ala. 430, it is laid down that although a promissory note, not under seal, may not be a merger of the contract for which it was given, yet the payee cannot recover on the original consideration, when his recovery on the note is defeated by proof of material alteration by him, without the assent of the maker, which renders the note void. The court say, "as the note was at first valid, there can be no recovery on the contract unless the note still continues valid, and is produced in evidence, or proved to have been

lost by time or accident; and to allow the payee, after he had designedly made a material alteration in the note, without the assent of the maker, to recover upon the contract for which the note was given, would be to depart from the sound and just principle that no one shall be permitted to take the chance of committing a fraud without running any risk by the event, when it is detected."

In Whitmer v. Frye, 10 Mo. 348, it was held, that where a party by his own act alters an instrument, so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the covenant, or promise contained in it, by any other evidence; and that this principle will prevent a resort to the common counts in order to sustain the plaintiff's right of recovery. This case is cited by counsel in White v. Hass, 32 Ala. 430, and was a case of a sealed instrument, but no stress was put upon that. See also 1 Greenl. Ev., § 568, and note 4; Newell v. Mayberry, 3 Leigh (Va.) 250; Mills v. Starr, 2 Bailey (S. Car.) 359, cited in 2 Smith's L. C. (5th Am. ed.) 961.

So it is held that where a note, given at the time when the liability occurs, is usurious, and therefore void by the New York law, no recovery can be had upon a general count for the sum justly due, for the whole transaction is infected; and yet the money justly due is good consideration for a subsequent express promise; but the law will raise no promise by implication. Rice v. Welling, 5 Wend. (N. Y.) 595; Early v. Mahon, 19 Johns. (N. Y.) 147; Hammond v. Hopping, 13 Wend. (N. Y.) 505.

In Blade v. Noland, 12 Wend. (N. Y.) 173, the suit was upon a note, destroyed or lost, and for the work and labor of which the note was given; and it was held that proof that the note was voluntarily and deliberately burnt will not authorize the secondary proof of its contents, or entitle the plaintiff to resort to the original consideration. Clute v. Small, 17 Wend. (N. Y.) 238, takes a distinction between an innocent alteration, though unauthorized, and a fraudulent alteration. The court, Cowen, J., says: "To allow a holder the privilege of destroying his note and thus bringing himself to the original consideration, would put it in his power to acquire an advantage by a wrongful suppression of testimony;" and he says of Atkinson v. Haydon, 2 Ad. & El. 628, that the question arose upon pleading, and for aught that appeared the alteration was made under an honest mistake of right, and he says perhaps this distinction should be adopted.

To the point that, although, technically speaking, such a note is not regarded as an extinguishment of an antecedent debt, yet it is treated as payment *sub modo;* or a payment on condition that the note prove to be productive, are the cases of Angel v. Felton, 8 Johns. (N. Y.) 149; Burdick v. Green, 15 Johns. (N. Y.) 247; Ward v. Evans, 2 Ld. Raym. 928.

To entitle the vendor, then, to maintain a suit on the original

promise, or for money had and received, the note must be produced and cancelled at the trial, or otherwise accounted for; and regularly it should appear that the note, when so produced, still continues valid, and not discharged or avoided. Such is the doctrine distinctly of Martindale v. Follet, and also of White v. Hass, 32 Ala. 430. If fraudulently altered by the vendor its identity is destroyed, and he shall not be permitted to explain it by showing his own turpitude. The vendor therefore has lost the power to produce the note, and by his own fraudulent act designed to injure the vendee or debtor; and he cannot, consistently with sound public policy, be permitted to recover on the original consideration, and thus, by merely changing the form of action, avoid the consequences of his crime. The rule which seeks to punish the offender by destroying the claim which is thus tampered with, has no such formal or technical foundation, but stands upon the broad foundation of public policy, which treats such an act as a virtual discharge of the debt, as much as if it had been released. * * *

HAYES v. WAGNER.

1906. 220 Ill. 256, 77 N. E. 211.

CARTWRIGHT, C. J.— * * * The contract was in writing and in duplicate, and the judgment of the Appellate Court has settled the fact that it was executed by the parties. One of the originals so executed was kept by the plaintiff and was afterward altered in material respects by changing the amount to be paid for the work from $52,000 to $54,700, changing the date of the completion of the work, and making other alterations in the agreement. The trial court, after receiving evidence as to the circumstances under which and the intent with which the alterations had been made, admitted in evidence the altered duplicate, and also admitted secondary evidence of the contents of the duplicate retained by the defendant. It is contended that the court erred in overruling the objections of the defendant to such evidence. The change in the contract made by the plaintiff made it different, in legal effect, from what it was when executed by the parties, and were therefore material. A material alteration of an executory written contract destroys it as a basis of recovery by the person making the alteration, and the changes in this contract invalidated it as against the defendant, who did not consent to such changes. No recovery could be had upon the contract, either in its altered form or in its original condition, and it was wholly void. (Pankey v. Mitchell, Breese, 383; Gillett v. Sweat, 1 Gilm. (Ill.) 475; Benjamin v. McConnel,

4 *id.* 536.) This was conceded to be the law, and the altered instrument was not offered in evidence as a basis for a recovery of damages, but only to show all the facts in relation to its execution as a part of the original transaction, and the changes made in it, in connection with all the facts and circumstances. The question whether there has been an alteration in a contract and the intent with which it has been made are questions for the jury, to be determined from all the circumstances. (2 Elliott on Evidence, § 1,516.) The intent with which alterations are made may be, and in this case was, material. If any alteration is innocently made, without fraudulent intent, it destroys the instrument by changing it into one to which the parties never agreed. But if there is an original debt or obligation which was not satisfied or extinguished by the instrument, a recovery can be had in such a case on such original debt or obligation. (Vogle v. Ripper, 34 Ill. 100; Elliott v. Blair, 47 *id.* 342, 2 Cyc. 183, 2 Am. & Eng. Ency. of Law (2d ed.) 200.) The court did not err in admitting in evidence the altered instrument for the purpose for which it was offered.

The objection of counsel for the defendant to the secondary evidence of the unaltered duplicate was, that the alteration of one rendered the other nugatory and void, and had the same effect upon the other duplicate that it had upon the one altered. A duplicate is defined as a document which is the same, in all respects, as another instrument from which it is indistinguishable in its essence and operation. (10 Am. & Eng. Ency. of Law (2d ed.) 318.) Instruments are executed in duplicate so that each party may have an original, and one is not a copy of the other, but both are primary evidence. In order to introduce an original duplicate it is not necessary that the other should also be produced, but to admit secondary evidence of the contents of one it is necessary to show the loss of both. (1 Greenleaf on Evidence, § 558.) If one of the duplicates is unaltered there is original primary evidence of the contract as agreed to by the parties, although the other duplicate has been destroyed, by alterations or otherwise. We see no good reason why the same principle upon which a recovery is allowed on the original consideration in case of an alteration without fraudulent intent should not be applied in a case where one of the duplicates has been innocently changed without fraudulent intent. The evidence for the plaintiff was that the alterations were made in contemplation of making a new and different contract, and that they were innocently made, without fraudulent intent, in the expectation that such new contract would be executed in the altered form, and were intended as notations or memoranda for making the new contract. We think it was proper to allow proof of the contents of the unaltered duplicate as the basis for recovery. * * *

FISHER v. KING.

1893. 153 Pa. St. 3, 25 Atl. 1,029.

DEAN, J.—* * * As to the averment, that there was a material alteration of the instrument after delivery, the evidence shows only the parties to it were present when it was sealed and delivered by King to Fisher. Fisher then left the house with the bill, and called upon Robert T. King, brother of defendant, who wrote his name in the place where should appear the name of a witness. If this was willfully done, with the knowledge and consent of Fisher, even though no additional liability was thereby imposed on the obligor, it avoided the instrument. The application of this rule does not, in case of willful alteration, depend on the injury done in the particular case; but as it is said in Neff v. Horner, 63 Pa. St. 330, its true ground is public policy, to insure the protection of instruments against fraud and substitution. And it has been held to be a material alteration to cause the name of a person to be placed on a note as witness who was in no respect a witness to any part of the transaction. Homer v. Wallis, 11 Mass. 312. If there be a material alteration by the payee after delivery, willfully, however innocent the intention, or however slight the prejudice to the maker, the instrument is avoided. But does the evidence show a willful alteration here? Robert T. King, whose name appears as the witness, testifies that Fisher came to his house, and asked him to go into a cigar store, and then, to use the witness' own words, "he asked me to indorse the note for Harry. He said that Harry and his wife and himself needed a little money, and he got Harry to give him that note so he could help him out; and he asked me to indorse it, and I did so." He further says he told Fisher at the time he had nothing to make his indorsement good, but that he intended to indorse it, not knowing any better. Fisher's testimony as to the transaction is vague. It tends to show, however, that he asked King to append his name as a witness. We assume that the court below adopted King's account of the transaction as the correct one; probably because he was a young man, and Fisher's recollection may have been impaired by his advanced age and infirmities. The fact, then, as found, is that King attempted to indorse the note, but, through ignorance, wrote his name as a witness. If there was no willful alteration, there is no reason for enforcing the rule that the alteration shall avoid the instrument. The purpose of the rule is to take away the motive for alteration by a forfeiture—a penalty which punishes the offender and deters others. But to inflict such a severe penalty for the blunder of an ignorant man accomplishes not the purpose of the law. No guilt is reached, for none exists. Other blunders are not deterred, for a forfeiture does not dispel ignorance. We are therefore of the opinion that under the facts of

this case the law does not call for a forfeiture of the obligation. * * *

CUSHING v. FIELD.

1879. 70 Me. 50.

APPELTON, C. J.— * * * It is claimed that the words on the note have been altered and that the indorsement across the end of the note was originally thus, "This note is subject of a contract made Nov. 13, 1874." The alteration relied on consists in changing "to" as it is claimed it was originally written to "of." It is difficult to imagine what motive anybody would have to make such a change. If made, it does not alter the relation of the parties. Whichever word is used, the note is subject to the contract. The idea that such an alteration was fraudulently made is simply preposterous. The probability is much greater that it was written "of" and then "of" changed to "to," for the purpose of making the intention, if possible, more clear. But either way, nobody could be harmed.

But it is well settled that an immaterial alteration will not avoid a contract. In Aldous v. Cornwell, 3 (L. R.) Q. B. 573, it was held that the second resolution in Pigot's case (11 Rep. at fol. 27 a), that if the obligee himself alters the deed * * * although it is in words not material, yet the deed is void," was not to be regarded as law. "No authority was cited," remarks Lush, J., "nor are we able to find any, in which the doctrine has been acted upon, and an instrument held to be avoided by an immaterial alteration." In Langdon v. Paul, 20 Vt. 217, where the plaintiff offered a sealed instrument in which he acknowledged he had "signed" certain notes, and the words "and executed" were interlined, it was held that the interlineation was immaterial. Whenever, by the alteration of a promissory note, neither the rights nor interests, duties or obligations of either of the parties are in any manner changed, the alteration is immaterial. Derby v. Thrall, 44 Vt. 413; Arnold v. Jones, 2 R. I. 345; Ames v. Colburn, 11 Gray (Mass.) 390; Cole v. Hills, 44 N. H. 227.

WOOD v. STEELE.

1867. 6 Wal. (U. S.) 80.

SWAYNE, J.—The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11, 1858, for $3,720, payable to their own order, one year from date, with interest at the rate of two per cent per month, and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time it appeared on the face of the note, that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. * * *

Was the instruction given, correct?

It was a rule of the common law as far back as the reign of Edward III that a rasure in a deed avoids it. Brooke, Abr., Faits, pl. 11. The effect of alterations in deeds was considered in Pigot's case, 11 Coke 27, and most of the authorities upon the subject down to that time were referred to. In Masters v. Miller, 4 T. R. 320, 1 Sm. Lead Cas. 1141, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss; and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly. Goodman v. Eastman, 4 N. H. 456; Waterman v. Vose, 43 Me. 504; Outhwaite v. Luntley, 4 Camp. 180; Bk. U. S. v. Boone, 3 Yeates (Pa.) 391; Mitchell v. Ringold, 3 H. & J. (Md.) 159; Stephens v. Graham, 7 Serg. & R. (Pa.) 509; Miller v. Gilleland, 19 Pa. St. 119; Heffner v. Wenrich, 32 Pa. St. 423; Stout v. Cloud, 5 Litt. (Ky.) 205; Lisle v. Rogers, 18 B. Mon. (Ky.) 529.

The instruction was correct, and the judgment is affirmed.

NOTE.—But "The Negotiable Instruments Law" now adopted by nearly all the states provides that "when a (negotiable) instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." See Rev. St. Ill., ch. 98, § 123 (141).

COBURN v. WEBB.

1877. 56 Ind. 96.

IN this case a note signed by Coburn contained the stipulation to pay "ten per cent per annum." A co-maker added the words "after maturity."

WORDEN, J.— * * * We are of opinion that the insertion of the words indicated destroyed the note as to Coburn, because they changed, in a material matter, the legal effect of the note as signed by him. The legal operation of the note, as signed by Coburn, entitled the holder to interest from the date of the note; but it was so changed, by the insertion of the words indicated, as not to bear interest until the maturity thereof. This change of the note did not, perhaps, operate to the prejudice of Coburn. But that is not the legal criterion by which to determine whether an alteration of a note destroys it.

The question is, is the note sued upon the same note, in legal effect, as that signed by Coburn? If the alteration made the note a different one in legal effect, then it is not Coburn's note, and he is

not bound by it. These views are fully sustained by the current of authorities in this State and elsewhere. 2 Daniel on Negotiable Inst., pp. 339 to 349; Holland v. Hatch, 11 Ind. 497; Henry v. Coats, 17 Ind. 161; Bowers' Adm'r v. Briggs, 20 Ind. 139; Judah v. Zimmerman, 22 Ind. 388; Schnewind v. Hacket, 54 Ind. 248; Chappell v. Spencer, 23 Barb. (N. Y.) 584.

The case last cited contains a valuable collection of the authorities upon the point. * * *

KEENE v. WEEKS ET AL.

1895. 19 R. I. 309, 33 Atl. 446.

IN this case a note was delivered by the payee to the maker to purchase stock, and the maker transferred it, in payment for stock, to one of two owners thereof (Daggett), who altered the note by reducing the rate of interest and afterwards transferred it to the other owner, who redelivered it to the payee upon an agreement to rescind the purchase of stock.

MATTESON, C. J.—* * * The evidence does not show that Daggett had any fraudulent purpose in changing the rate of interest specified in the note, or that there was any other motive for it than his scruples against receiving what might be regarded as an excessive interest. The fact that the change was to a lower rate than that specified, and consequently was against his interest as a holder of the note, and to the advantage of the parties liable on it, in the absence of any other fact, rebuts the presumption of a fraudulent intent, which otherwise, perhaps, would arise from the alteration. Whitmer v. Frye, 10 Mo. 349; Wheelock v. Freeman, 13 Pick. (Mass.) 165; Robinson v. Reed, 46 Iowa 219. The presumption of a fraudulent intent being rebutted, the plaintiff can recover, under the common counts in the declaration, the debt for which the note was given, as against the parties who received the consideration. Booth v. Powers, 56 N. Y. 22, 31; Clute v. Small, 17 Wend. (N. Y.) 238; Meyer v. Huncke, 55 N. Y. 412, 417; Hunt v. Gray, 35 N. J. Law 227, 234; Matteson v. Ellsworth, 33 Wis. 488; Bank v. Shaffer, 9 Neb. 1, 5, 1 N. W. 980; 2 Daniel Neg. Inst., §§ 1411, 1413. * * *

It has been held in many cases, especially in equity, that a *bona fide* attempt to make an instrument conform to the intention and understanding of all the parties or merely to correct a mistake therein, does not invalidate the instrument. See Benjamin, Principles of Contract, 343.

REED v. KEMP.

1855. 16 Ill. 445.

In this case Edward D. Kemp filed a bill against John G. Reed, for a specific performance of the following contract:

"Know All Men by These Presents, That I, J. G. Reed, for and in consideration of the sum of sixty-five dollars, to me in hand paid by E. D. Kemp, do bind myself, my heirs and administrators by these presents, unto Edward D. Kemp, his heirs or assigns, or administrators, in the penal sum of five hundred dollars, to make and deliver unto said Kemp a good and sufficient deed of the east half of the southwest quarter of section twenty-four, township sixteen north, six east, in Bureau county, Illinois, as soon as the deed can be obtained from the general land office.

"In witness whereof, I have set my hand this 12th day of July, 1851. J. G. Reed."

The following alterations are made in this paper. The insertion of the words "I, J. G. Reed," in the beginning of the instrument; the alteration of the word "three" to "five," in expressing the consideration of the bond, and the erasing of the figures "12," after the word "July," and putting them before.

Scates, C. J.— * * * The alterations admitted by Kemp to have been made by him, are immaterial. Nor indeed can we regard any alleged alterations to be material, to alter the sense, liability, or the obligation of the bond. If it were set up, or in fact made, as a mortgage, the alteration of the consideration from sixty-three to sixty-five, taking that to be the amount of the debt, would be a material one, and enlarge the amount of the obligation. So would a change in the penalty of a bond. But it would seem to be otherwise if the mere recital of a consideration in a deed or contract, for the simple and sole purpose of showing that there was a valuable consideration paid, or to be paid. Such appears to us to be the character of this recital, and the object of expressing the amount paid in this case, and it can make no difference in the validity or obligation, whether it were five or sixty-five. * * *

A bond is valid without inserting the name of the obligor in the body of the bond. *Ex parte* Fulton, 7 Cowen (N. Y.) 484. So the insertion afterwards, is an immaterial alteration. So may "year" be inserted, when it will not alter the obligation of the contract. Hunt, administrator v. Adams, 6 Mass. 519. So the inserting of "pump and well of water" into a conveyance, has added nothing, as they passed without. Bowen v. Pinkham, 18 Pick. (Mass.) 172. Prefixing as a caption to an auction sale, the words "sales at auction, March 6, 1826," was held immaterial. Nichols v. Johnson, 10 Conn. 196. * * * Tested by all these examples, and compared with others reported, and by the strictest scrutiny into the apparent or supposed

motive in this instance, we still find nothing which will authorize us to set this contract aside. Ignorance is the most apparent motive. While we sustain the contract, however, we will not withhold an expression of our decided disapprobation of all, or any liberties of this character, with writings by which others are bound. No advantages are ever gained, and most frequently much injury is done the party himself, by the suspicion and distrust thrown upon his acts and his motives.

We are all agreed, that, admitting that Kemp made them, they are sufficiently explained by the proofs, are consistent with the true contract of the parties, and it is valid and binding. * * *

NICHOLS v. JOHNSON.

1834. 10 Conn. 192, 197.

CHURCH, J.— * * * It is said in Pigot's case, 11 Co. Rep. 27, and also in Markman v. Gonaston, Cro. Eliz. 626, that "when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing a pen through a line, or through the midst of any material word, the deed thereby becomes void." This doctrine, not without good reason, has been supposed to have been derived from the ancient technical forms of pleading in cases of deeds, and from principles applicable to proferts. Read v. Brookman, 3 Term. Rep. 151; Masters v. Miller, 4 Term Rep. 321. But whatever may have been the origin of this principle, it has been much relaxed, if not entirely subverted, in later times, so far as it extends to the acts of strangers. As early as the reign of Car. 2 it was decided, that a deed was not made void, the seal of which had been torn off by a little boy. Palm. 413. Before the case of Read v. Brookman, 3 Term Rep. 151, it was uncertain how far a profert could be dispensed with, in a court of law; and in that case, it was, for the first time, settled, that the loss or destruction of a deed would excuse a profert; and that a resort to a court of equity, in such cases, was not necessary. More recently, it has been holden, that an alteration of a written instrument, by mistake, will not defeat it. Chitty on Cont. 298; Raper v. Birkbeck & al., 15 East 17; Wilkinson & al. v. Johnson & al., 3 Barn. & Cres. 428 (10 Serg. & Lowb. 140). In the case of Henfree v. Bromley, 6 East 310, the court of King's Bench decided, that where an umpire, after the expiration of his power, had altered an award in a material part, such award was not thereby rendered void, but as good as before the alteration. In the case of Jackson d. Malin v. Malin, 15 Johns. (N. Y.) 293, it was

said, by Platt, J., "that a material alteration, though made by a stranger, without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent." And in a still later case of Rees v. Overbaugh, 6 Cowen (N. Y.) 746, this subject was discussed, by the supreme court of the state of New York, and it was holden, that if a stranger tear a seal from a deed, it shall not destroy it. And no distinction exists, in this respect, between deeds and other written instruments. 4 Term Rep. 321. The reasons controlling the decisions in this case referred to, seem entirely applicable to the present, and wholly inconsistent with the old doctrine of Pigot's case, in its application to the act of strangers to the deed. Indeed, it can hardly be conceived, if a deed or other instrument in writing is not rendered inoperative, by either a mistaken alteration, or its loss or even entire destruction, how it can be, by an unauthorized intermeddling of a stranger. * * *

GLEASON v. HAMILTON.

1893. 138 N. Y. 353, 34 N. E. 283.

IN this case there was an alteration of a mortgage given to secure notes, by causing it to secure other notes also, without the knowledge or procurement of the mortgagee. The action was to foreclose the mortgage for non-payment of the notes which it was originally given to secure.

PECKHAM, J.—The plaintiff was wholly ignorant of the alteration attempted to be made in the mortgage, and so remained until after the commencement of this action. The action itself is brought to foreclose the mortgage for non-payment of paper which, confessedly, it was originally given to secure. The attorney who wrote in the addition to the mortgage as it originally was executed had no power, as agent of the plaintiff, to make any alteration in the instrument by which its validity should be avoided. While the high character of the attorney who directed the addition might render it entirely plain that there was no intention of making any fraudulent alteration, and while the evidence seems to pretty clearly show there was not in fact the slightest wrongful intent in directing the alteration, and that it was done for the purpose of thereafter securing the assent of the defendant to the alteration, yet no such assent was secured; and this act of the attorney for the plaintiff cannot properly, as we think, operate as if it had been an alteration made in a material part of the mortgage by the plaintiff himself, or by his attorney or agent, with his knowledge or by his authority, expressed or implied. The act of the attorney did not, and ought not to, bind the plaintiff in this case.

Many cases have arisen since the decision of Pigot's Case, 11 Coke 27, where it was held that a material alteration made by a stranger to a deed, and without the privity of the obligee, did nevertheless invalidate the instrument. As late as the years 1843 and 1844 this decision was treated with respect by the English courts. Davidson v. Cooper, 11 Mees. & W. 778, 798, in exchequer chamber, 13 Lees. & W. 343. But there has been since that period a departure from this rule, even in England (see Aldous v. Cornwell, L. R. 3 Q. B. 573, A. D. 1868), while in our state the cases referred to in the opinion delivered in the general term in this case, and those cited in the briefs of counsel before this court, show that when an alteration is not made by a party to the instrument, and in a material matter, the alteration is of no effect, and the original validity of the instrument remains. Casoni v. Jerome, 58 N. Y. 315, 321; Smith v. Kidd, 68 N. Y. 130, 141; Martin v. Insurance Co., 101 N. Y. 498, 5 N. E. 338; Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 134, 21 N. E. 168. In Vermont the same rule obtains. Bigelow v. Stilphen, 35 Vt. 521. So, also, in other states. Robertson v. Hay, 91 Pa. St. 242; Hunt v. Gray, 35 N. J. Law 227; Nickerson v. Swett, 135 Mass. 514; Brooks v. Allen, 62 Ind. 401.

Upon this view of the character and effect of the alteration, we think it clear that the judgment ought to be affirmed. * * * Upon the ground that the plaintiff was not in any manner responsible for the attempt, unknown to him, to enlarge the liability of the mortgagor by the proposed alteration, and because the plaintiff seeks only to enforce the mortgage as it was originally executed, we affirm the judgment. * * *

NELSON v. WHITE.

1878. 61 Ind. 139, 142.

PERKINS, J.—* * * The case is this: The appellant, Nelson, on the 13th of June, 1874, had given his note for one thousand dollars, bearing interest at six per cent., containing an agreement to pay attorney's fees, and payable on the 12th day of June, 1876. The note was secured by a mortgage on his land. Subsequently he desired to get his land released from the lien of the mortgage, by substituting personal security; and, to accomplish such release, he, with R. J. Gauntt, his proposed security, met the appellee, the owner of the note, and consented that the words, "ten per cent. interest after maturity," should be inserted in it; the holder thereof consented that Gauntt should sign it; he did so, and Nelson received the release of his land from the lien of the mortgage; Gauntt, the surety, is satisfied, and makes no objection to the judgment against him upon the note. The only alteration made in the note, so far as Nelson is con-

cerned, was the insertion, by his consent, of the ten per cent. interest clause. All the terms of the note, with this exception, are those he signed in 1874. This alteration, so made, left the terms of the original note, which were not varied by alteration, in full force and effect, and operative from the date of the note. Wilson v. Henderson, 9 Sm. & M. (Miss.) 375; Bailey v. Taylor, 11 Conn. 531; Bucklen v. Huff, 53 Ind. 474.

A material alteration, made without the consent of a party to the note, might render it void as to him. Bowser v. Rendell, 31 Ind. 128; Bowers' Adm'r v. Briggs, 20 Ind. 139; The State v. Van Pelt, 1 Ind. 304. * * *

CHESSMAN v. WHITTEMORE.

1839. 23 Pick. (Mass.) 231, 233.

MORTON, J.— * * * The law in relation to the alteration of deeds and other written instruments is settled. And although it has relaxed from its ancient rigor and strictness, yet it is now well known, that a material alteration of an instrument, whether under seal of not, by a party to it, in name or in interest, invalidates it. Formerly it was holden, that an immaterial alteration by a party or a material one by a stranger, was fatal. But these principles were found to be inconsistent with reason and justice, and have been expunged from the law. Dyer, 262; Shep. Touch., 69; Com. Dig. Fait, F 1; Pigot's case, 11 Coke 27; Jackson v. Malin, 15 Johns. (N. Y.) 297; Rees v. Overbaugh, 6 Cowen (N. Y.) 746; Smith v. Crocker, 5 Mass. 538; Hunt v. Adams, 6 Mass. 519; Hatch v. Hatch, 9 Mass. 307.

There is a manifest distinction between executory contracts and conveyances of property. When deeds of conveyance of real, or bills of sale of personal property, are completed and possession delivered under them, so far as the change of ownership depends on them they are executed, and the property passes and vests in the grantee. The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee, may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest times. See Viner's Abr. Fait, X 2. It has always been holden, that even the cancellation of a deed will not divest the grantee of his estate under it. Co. Lit. 225b, note 136; Clavering v. Clavering, Prec. Cham. 235; Miller v. Manwaring,

Cro. Jac. 399; Bolton v. The Bishop of Carlisle, 2 H. Bl. 263; Harrison v. Owen, 1 Atk. 520. This doctrine has been explicitly recognized and confirmed in this country, and in our own courts. Jackson v. Chase, 2 Johns. (N. Y.) 87; Lewis v. Payn, 8 Cowen (N. Y.) 75; Jackson v. Gould, 7 Wendell (N. Y.) 364; Botsford v. Morehouse, 4 Conn. 550; Gilbert v. Buckley, 5 Conn. 262; Marshall v. Fisk, 6 Mass. 32; Hatch v. Hatch, 9 Mass. 307; Holbrook v. Tirrel, 9 Pick. (Mass.) 105. Many of these cases seem to be directly in point. * * *

GOODFELLOW v. INSLEE.

1858. 12 N. J. Eq. 355.

CHIEF JUSTICE.— * * * The only question upon this exception is, whether the master was right in allowing $34.50 as the true amount of the original receipt, or whether the Chancellor was right in entirely disallowing it as an altered paper. Whether the original amount of the receipt can be clearly and certainly ascertained, is a mere question of inspection. There is no evidence independent of the paper itself. It appears to me that the master was right in holding that the original receipt was given for $34.50. That is apparent by close inspection. Then, should the receipt be entirely rejected as an altered paper? If altered by Mrs. Goodfellow herself, or by her procurement, it imports fraud or improper design on her part, and clearly vitiates the receipt as an instrument of evidence. But if the mutilation of the instrument was by a stranger without the participation of Mrs. Goodfellow, it is a mere spoliation, and so long as it remains legible, it does not change its legal operation. 1 Greenl. Ev., § 566. * * *

MUNDY ET AL. v. STEVENS.

1894. 61 Fed. 77, 86.

ACHESON, CIRCUIT JUDGE.— * * * The situation, then, is this: One of the two sureties assented to the alteration of the contract; the other did not. In this state of affairs, the non-assenting surety is discharged, but the other remains bound as before. Wolf v. Fink, 1 Pa. St. 435; Crosby v. Wyatt, 10 N. H. 318. The assenting surety, in such case, in effect agrees that he will stand as surety for the whole liability, and that his cosurety shall be released. *Id.* Where one of the several defendants sued upon a joint contract sets up a defense personal to himself, the approved practice is to allow

a *nolle prosequi* as to that particular defendant, and to proceed against the others by verdict or judgment after the verdict, as the case may be. Minor v. Bank, 1 Pet. (U. S.) 46; Kurtz v. Becker, 5 Cranch C. C. (U. S.) 671, Fed. Cas. No. 7951; Commonwealth v. Nesbitt, 2 Pa. St. 16; Freedly v. Mitchell, *id.* 100; Woodward v. Newhall, 1 Pick. (Mass.) 500; Burke v. Noble, 48 Pa. St. 168. * * *

BANKRUPTCY.

§ 98.—When there is a Bankrupt law a discharge in bankruptcy duly granted, will, subject to the limitations, if any, imposed by the law, release the bankrupt from all debts and liabilities provable against his estate in bankruptcy.

CHAPTER XIII.

DISCHARGE OF CONTRACT BY BREACH.

UPON every breach of a contract the injured party acquires a right of action for compensation, but it is not every breach by one of the parties that will discharge the other from performance of his part of the contract. For the promise of one party may be absolute and independent of that of the other, or the breach may be in a matter not considered by the parties as essential to the continuance of the contract.

If one of the parties to a contract breaks it in one of the following ways, the other party may, as a general rule, avail himself of the breach as a discharge from any further performance on his part, and thereupon bring an action for compensation in damages.

1. Breach of renunciation of the contract.
2. Breach by an act that renders the contract impossible of performance.
3. Breach by a failure of performance where the performance is a condition concurrent with or precedent to the performance of the other party, or where the failure goes to the essence of the contract.

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§ 99 (1)—Renunciation of Contract Before Performance is Due.

ROEHM v. HORST ET AL.

1900. 178 U. S. 1.

THIS was an action for breach of four certain contracts. Judgment for plaintiffs in United States Circuit Court, affirmed by circuit court of appeals, was taken to the supreme court.

FULLER, C. J.—It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts for 100 bales each, covering the furnishings of 1,000 bales of hops during a period of five years, of which 600 bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for 1,000 bales, the breach alleged would have occurred while the contract was in the course of performance; but

plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897," set them out *in extenso,* and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediatey instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to Cutter v. Powell, 2 Smith Lead. Cas. 1212, 1220, 9th edition, by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

In Hochster v. De la Tour, 2 El. & Bl. 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June 1st, on certain terms. On the 11th of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May 22d, plaintiff brought an action at law for breach of contract in that defendant, before the said 1st of

June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice Crompton observed: "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'"

In delivering the opinion of the court (Campbell, Ch. J., Coleridge, Erle, and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said:

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plain-

tiff as a courier on the continent of Europe in the months of June, July, and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case."

In Frost v. Knight, L. R. 7 Exch. 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the exchequer chamber, overruling the decision of the court of exchequer (L. R. 5 Exch. 322), that for this breach an action was well brought during the father's lifetime. Cockburn, Ch. J., said: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster v. De la Tour, 2 El. & Bl. 678, and the Danube & B. S. Railway & K. Harbour Co. v. Xenos, 13 C. B. N. S. 825, on the one hand, and Avery v. Bowden, 5 El. & Bl. 714; Reid v. Hoskins, 6 El. & Bl. 953, and Barrick v. Buba, 2 C. B. N. S. 563, on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and

in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

The case of Danube & B. S. Railway & K. Harbour Co. v. Xenos, 11 C. B. N. S. 152, is stated in the headnotes thus: On the 9th of July, A, by his agent, agreed to receive certain goods of N on board his ship to be carried to a foreign port,—the shipment to commence on the 1st of August. On the 21st of July A wrote to B, stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the original contract. B, by his attorneys, gave A notice that he should hold him bound by the original contract, and that, if he persisted in refusing to perform it, he (B) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August, A again wrote to B, stating that he was then prepared to receive the goods on board his ship, making no allusion to the original contract. B had, however in the meantime entered into a negotiation with one S for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S on the 2d of August. B thereupon sued A for refusing to receive the goods pursuant to his contract; and A brought a cross action against B for refusing to ship. Upon a special case stating these facts: Held, that it was competent to A to treat B's renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross action of A, and sustained B's plea that before breach A discharged him from the performance of the agreement.

Erle, Ch. J., said (p. 175): "In Cort v. Ambergate, N. & B. & E. Junction R. Co., 17 Q. B. 127, it was held that, upon the company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them and sue the company for the breach of contract without tendering the goods for their acceptance. So, in Hochster v. De la Tour, 2 El. & Bl. 678, it was held that the courier whose services were engaged for a period to commence from a future day, being told before that day that they would not be accepted, was at liberty to treat that as a complete breach, and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in Avery v. Bowden, 5 El. & Bl. 714, 6 El. & Bl. 953, where the agent of the charterer intimated to the captain that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was not to fall within the principle already adverted to, and not to amount to a breach or renunciation of the contract. But where there is an explicit declaration by the one party of his intention not to perform the

contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action."

The case was heard on error in the exchequer chamber before Cockburn, Ch. J., Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Wilde, B.; and the judgment of the common pleas was unanimously affirmed. 13 C. B. N. S. 825.

In Johnstone v. Milling, L. R. 16 Q. B. Div. 467, Lord Esher, Master of the Rolls, puts the principle thus: "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

Lord Justice Bowen said (p. 472): "We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen,* and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court.

In Smoot's Case, 15 Wall. (U. S.) 36, 48, Mr. Justice Miller observed: "In the case of Phillpotts v. Evans, 5 Mees. & W. 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive

it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of the wheat at the time of the notice or at the time of the tender. Baron Parke said: 'I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept.' And though some of the judges in the subsequent case of Hochster v. De la Tour, 2 El. & Bl. 678, disapprove very properly of the extreme ground taken by Baron Parke, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff."

In Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not arrived. Mr. Justice Bradley, delivering the opinion of the court, said: "Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damages he has sustained thereby."

In Dingley v. Oler, 117 U. S. 490, it was held that the case did not come within the rule laid down in Hochster v. De la Tour, but within Avery v. Bowden and Johnstone v. Milling, since, in the view entertained by the court, there was not a renunciation of the contract by a total refusal to perform.

So in Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 264, involving a contract for the delivery of iron ore, the court said: "The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiff as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such."

In Anvil Min. Co. v. Humble, 153 U. S. 540, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about."

In Pierce v. Tennessee Coal, I. & R. Co., 173 U. S. 1, it was held that on discharge from a contract of employment the party discharged might elect to treat the contract as absolutely and finally broken, and in an action recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn; and Mr. Justice Gray said: "The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representatives after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract."

In Hancock v. New York L. Ins. Co., Fed. Cas. No. 6011, Hochster v. De la Tour was followed by Bond, J., in the circuit court for the eastern district of Virginia; and in Grau v. McVicker, 8 Biss. (U. S.) 13, Drummond, J., fully approved of the principles decided in that case, and remarked: "It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards, or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages."

Again, in Dingley v. Oler, 11 Fed. 372, Lowell, J., applied the rule in the circuit court for the district of Maine, and, after citing Hochster v. De la Tour, Frost v. Knight, and other cases, said: "These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic." And see Foss-Schneider Brewing Co. v. Bullock, 16 U. S. App. 311, 59 Fed. 83, 8 C. C. A. 14; Edward Hines Lumber Co. v. Alley, 43 U. S. App. 169, 73 Fed. 603, 19 C. C. A. 599; Marks v. Van Eeghen, 57 U. S. App. 149, 85 Fed. 853, 30 C. C. A. 208.

The great weight of authority in the state courts is to the same effect, as will appear by reference to the cases cited in the margin.

(Fox v. Kitton, 19 Ill. 518; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; John A. Roebling's Sons Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Mountjoy v. Metzger, 9 Phila. (Pa.) 10; Zuck v. McClure, 98 Pa. St. 541; Hocking v. Hamilton, 158 Pa. St. 107, 27 Atl. 836; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Platt v. Brand, 26 Mich. 173; Crabtree v. Messersmith, 19 Iowa 179; McCormick v. Basal, 46 Iowa 235; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Cobb v. Hall, 33 Vt. 233; Davis v. Grand Rapids School Furniture Co., 41 W. Va. 717, 24 S. E. 630, and other cases cited in the text-books and encyclopædias.)

On the other hand, in Greenway v. Gaither, Taney 227, Fed. Cas. No. 5788, Mr. Chief Justice Taney, sitting on circuit in Maryland, declined to apply the rule in that particular case. The cause was tried in November, 1851, and more than two years after, at November term, 1853, application was made to the chief justice to seal a bill of exceptions. Hochster v. De la Tour was decided in June, 1853, and the decision of the circuit court had apparently been contrary to the rule laid down in that case. The chief justice refused to seal the bill, chiefly on the ground that under the circumstances the application came too late, but also on the ground that there was no error, as the rule was only applicable to contracts of the special character involved in that case, and the chief justice said as to the contract in hand, by which defendant engaged to pay certain sums of money on certain days: "It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived."

The rule is disapproved in Daniels v. Newton, 114 Mass. 530, and in Stanford v. McGill, 6 N. Dak. 536, 38 L. R. A. 760, 72 N. W. 938, on elaborate consideration. The opinion of Judge Wells in Daniels v. Newton is generally regarded as containing all that could be said in opposition to the decision of Hochster v. De la Tour, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

In Nichols v. Scranton Steel Co., 137 N. Y. 487, 33 N. E. 566, Mr. Justice Peckham, then a member of the court of appeals of New York, thus expresses the distinction: "It is not intimated that in the

bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of Daniels v. Newton was rested is that until the time for performance arrives neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action."

But there are many cases in which, before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in Daniels v. Newton, though it is not there in terms decided "that an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." Parker v. Russell, 133 Mass. 74.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in

course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?

As Lord Chief Justice Cockburn observed in Frost v. Knight, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him; while, by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the nonfulfilment of the contract.

During the argument of Cort v. Amergate, N. & B. & E. Junction R. Co., 17 Q. B. 127, Erle, J., made this suggestion: "Suppose the contract was that plaintiff should send a ship to a certain port for cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?" And if it was not necessary for the ship owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied

that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in Hochster v. De la Tour is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day.

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made sub-contracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case plaintiffs showed at what prices they could have made sub-contracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

Judgment affirmed.

The rule as to anticipatory breach is not applicable to cases where the repudiation is only partial; as in the case of a lease containing

several covenants where there is a refusal to comply with a particular covenant not going to the whole consideration. See Johnstone v. Milling, 16 Q. B. D. 460, 468; Obermeyer v. Nichols, 6 Binn. 159.

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§ 99 (2)—Renunciation of Contract in the Course of Performance.

LAKE SHORE & MICH. SO. RY. CO. v. RICHARDS.

1894. 152 Ill. 59, 38 N. E. 773.

SHOPE, J.—* * * In Cort et al. v. Ambergate Railway Co. (17 Q. B. 127) the plaintiffs contracted to supply the defendants with 3,900 tons of iron chairs to be used in railway construction. They manufactured and delivered various quantities of chairs from May, 1847, until December, 1849, when the defendants informed plaintiffs that they did not want any more and not to send any more, leaving 2,113 tons undelivered, whereupon plaintiffs brought suit to recover damages, including loss of profits. It was objected that to entitle the plaintiffs to recover they should have proved that the chairs had been made and had been tendered in the manner provided by the contract, or at least before the bringing of the suit, etc. In delivering the opinion of the court, Lord Campbell, C. J., said: "We are of opinion that the jury were fully justified, from the evidence, in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense, the meaning of * * * readiness and willingness must be, that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured?" And after showing that if, after having accepted a part, the defendants resolved not to accept the balance, the effect of compelling the plaintiffs to proceed with the manufacture and tender of them would be the enhancement of the damages the defendants would be required to pay, his lordship proceeds: "Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, 'Make no more for us, for we will have nothing to do with them,' was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendant laid peculiar stress upon the words" (of the plea) "'Nor did they prevent or discharge the plaintiffs from supplying the residue of the chairs and from the further execution of the contract.' We consider the material part of the allegation which the last plea traverses, to be, that the defendants

refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs and from the further execution of the contract. It is contended that 'prevent' here must mean obstruction by physical force, and in answer to a question from the court we were told it would not be a preventing of delivery of goods if the purchaser were to write in a letter to the person who ought to supply them, 'Should you come to my house to deliver them I will blow your brains out.' But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done except by physical force or brute violence?" After reviewing and commenting upon cases cited, it is then held that the plaintiffs were entitled to a verdict on pleas traversing allegations that they were ready and willing to perform the contract, that the defendants refused to accept the residue of the goods, and prevented and discharged the plaintiffs from manufacturing and delivering them.

Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves amount to a breach, so as to create an effectual renunciation of the contract, for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. (Kadish v. Young, 108 Ill. 170.) As said by Bowen, L. J., in Johnstone v. Milling, 16 Q. B. Div. 460: "Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen,* and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. * * * If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the con-

tractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. These views are amply sustained by numerous decided cases. * * *

The principle seems to have found general recognition by the courts of this country, a few, only, of which need be noticed. In Masterson v. Mayor of Brooklyn, 7 Hill (N. Y.) 61, the plaintiffs undertook and partially performed their contract with defendants to furnish material, etc., for the construction of the city hall. By order of the defendants the work was indefinitely suspended, and the plaintiffs brought suit to recover damages, including future profits. The principle announced in the English cases before noted is approved. Beardsley, J., there said: "The party who is ready to perform is entitled to full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. * * * The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach."

The case of Hosmer v. Wilson (7 Mich. 294) has been already cited.

In Derby v. Johnson (21 Vt. 17), after holding that by the order of the defendants to discontinue the work the plaintiffs were prevented from further performance, it is said: "The plaintiffs might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so, for it doubtless continued binding on the defendants."

In Hinckley v. Pittsburg Steel Co., 121 U. S. 264, the defendant agreed to purchase from the plaintiff steel rails, to be drilled as the defendant might direct. The defendant refused to give the directions, and at his instance the rolling of the rails was postponed until after the time of delivery, when the defendant refused to accept any rails under the contract. It was there said: "The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manu-

facturing the rails, and the rule of damage applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present."

In Hanies v. Tucker, 50 N. H. 307, the defendants agreed to purchase of the plaintiffs 5,000 bushels of malt, and to receive and pay for the same at the rate of 1,000 bushels per month. Although plaintiffs were prepared to deliver the 1,000 bushels per month, the defendants called for and received less than 1,000 bushels during the first three months. The plaintiffs informed defendants that they were prepared to furnish the malt according to the terms of the contract, and requested them to receive the same at the rate of 1,000 bushels per month, which the defendants refused to do. The undelivered malt, not utilized by plaintiffs themselves, was sold on the market, and plaintiffs brought assumpsit against the defendant to recover damages for a breach of the contract, and it was there held, following Cort v. Ambergate Railway Co. *supra,* and other cases, that the conduct of the defendants amounted to an unqualified renunciation of the contract, and that after such renunciation it was no longer necessary that the plaintiffs should hold themselves in readiness to perform, or to go to the trouble and expense of offering what had already been refused.

In Smith v. Lewis, 24 Conn. 624, the doctrine as announced in Cort v. Amergate Railway Co. was approved and followed, and again reaffirmed in the same case. (26 Conn. 110.) In these cases the holding was, that under a contract containing mutual and dependent covenants, a refusal on the part of the defendant to perform obviated the necessity of performance, or tender of performance, on the part of the plaintiff, after such refusal. * * *

WIGENT v. MARRS.

1902. 130 Mich. 609, 90 N. W. 423.

A CONTRACT for a monument to be erected on a foundation prepared by defendant was renounced by defendant before the monument was completed, and plaintiff finished it and erected it at his own cost. Under a declaration upon the common counts plaintiff sought to recover the contract price and the cost of the foundation. Judgment for defendant and plaintiff brought error.

HOOKER, C. J.— * * * It is undisputed that defendant unqualifiedly renounced this contract before the monument was completed, and forbade its completion and erection upon her premises. Many authorities hold that she had the right to do this, and thereafter

plaintiff's right of recovery would be limited to damages for the breach of the contract involved in the renunciation. In Meechem, Sales, § 1091, the author says: "The law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress." "The contract is not rescinded, but broken; and, immediately the other party has the right to deem it in force for the purpose of the recovery of his damages; he is under no obligation for that purpose to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." *Id.*, § 1092. This subject is discussed in the case of Hosmer v. Wilson, 7 Mich., at page 305, 74 Am. Dec. 716, where Mr. Justice Christiancy says:

"And it is certainly very questionable whether the party thus notified has a right to go on after such notice to increase the amount of his own damages. In Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract; and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in Derby v. Johnson, 21 Vt. 21." Mr. Justice Christiancy adds that: "This would seem to be good sense, and therefore sound law; and it would seem that any other rule must tend to the injury, and in many cases to the ruin, of all parties." In the case of Danforth v. Walker, 37 Vt. 244, the court said of a similar case: "While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party." See, also, Butler v. Butler, 77 N. Y. 472, 33 Am. Rep. 648; Clause v. Printing Press Co., 118 Ill. 612, 9 N. E. 201. * * * There are only two theories upon which the common counts could be relied upon in this case: First, upon the theory that the contract had been performed, and that the contract price was therefore recoverable; and, second, for the work and material used in the foundation built by the plaintiff. The undisputed facts show that the contract was not performed on receipt of the renunciation, and there could be no recovery for the erection of the foundation, because the plaintiff was never requested to build it, but, on the contrary, was prohibited from doing anything further in performance of the contract. The

only redress that the plaintiff would be entitled to recover would be damages for the breach of the contract if renunciation should be found to be unwarranted, which does not appear.

It follows that the judgment must be affirmed.

"Where one party to a contract repudiates it and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: (1) He may treat the contract as rescinded, and recover upon a *quantum meruit* so far as he has performed; or (2) he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover under the contract; or (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing," continuing the contract in force for the latter purpose only. Lake Shore, etc., Ry. Co. v. Richards, 152 Ill. 59, 80, 38 N. E. 773, 777.

A renunciation cannot be retracted after it has been treated as a breach, or when its withdrawal would be too late to allow due performance of the contract. Cochran v. Yoho, 34 Wash. 238, 247, 75 Pac. 815; Ault v. Dustin, 100 Tenn. 366, 387, 45 S. W. 981.

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§ 99 (3)—Disabling Act Before Performance is Due.

CARTER v. RHODES.

1901. 135 Cal. 46, 66 Pac. 985.

A CONTRACT for the sale of an interest in a mine provided that a balance of the purchase price was to be paid only out of the net proceeds of the working of the interest conveyed, and in no event was to become a personal claim against the purchaser, but subsequently the vendor agreed to permit the purchaser to sell his interest, provided the purchaser would become personally responsible for the balance due. And thereupon the purchaser sold his interest.

VAN DYKE, J.—* * * There was a consideration for the obligation of the appellant to pay the $1,000 upon the sale of his interest in the mine by the release of the respondent, in order to permit such sale. Further, by the sale of his interest in the mine the appellant put it out of the power of the respondent to receive the $1,000 from the net proceeds of that interest, and appellant at once became personally responsible to pay the

$1,000. In the case of Wolf v. Marsh, 54 Cal. 228, the defendant executed to the plaintiff a written agreement, whereby he promised to pay a sum of money when realized from the profits of certain coal mines in which he owned an interest. Before the mines had yielded any profit to the defendant, he sold and conveyed his interest in them to a stranger. The court in that case say: "By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary that, if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefore, without demand, even though the time specified for the performance has not expired." See, also, Love v. Mabury, 59 Cal. 484; Bish. Cont., § 1426; Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117. In Poirier v. Grave, 88 Cal. 79, 25 Pac. 962, in an agreement to pay $1,700 out of the net proceeds of the product of mineral, timber, and wood taken from a certain section of land, it was specified that: "Said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation." It was alleged in the complaint in that case that the party had sold and conveyed to other persons the land and product thereof, and had not paid a part of the money which she had agreed to pay; and the court say, "This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof;" referring to Wolf v. Marsh, and the other cases cited.

UNITED STATES v. PECK.

1880. 102 U. S. 64.

BRADLEY, J.— * * * That the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison Cont., § 326; Fleming v. Gilbert, 3 Johns. (N. Y.) 527. In the case last cited, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and, having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. Judge Thompson said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further

compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond." So when A gave to B a bond to convey certain premises, but they subsequently agreed by parol to rescind the contract, and A thereupon sold the premises to a third person, it was held that, though the bond was not canceled or given up nor any of the papers changed, yet by the parol agreement and the acts of the parties under it the bond was discharged. Dearborn v. Cross, 7 Cow. (N. Y.) 48; and see 2 Cowen & H., Notes to Phillips Ev., 605. * * *

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§ 99 (4)—Disabling Act in the Course of Performance.

ANVIL MINING CO. v. HUMBLE ET AL.

1894. 153 U. S. 540.

BREWER, J.— * * * Defendant also complains of the following instruction, "If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

It is insisted and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberey to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a recission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the

party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused. * * *

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§ 99 (5)—Non-Performance of a Condition Precedent or Concurrent.

HOUGH v. RAWSON.

1856. 17 Ill. 588.

SKINNER, J.—This was an action of assumpsit by Rawson against Hough, upon a written contract for the delivery of corn by Hough to Rawson at a particular time at Chicago, at a stipulated price per bushel, to be paid for on delivery. The declaration alleges for breach the non-delivery of the corn, and that Rawson was ready and willing to accept and pay for the corn according to the terms of the contract. Verdict and judgment for plaintiff below. * * *

The court refused to instruct on the part of the defendant, "That unless the plaintiff has proven that he was ready to pay for the corn at the place of delivery, he cannot recover." "That unless he has proven a readiness on his part to perform his part of the contract, he cannot recover."

Although the language of the instructions asked by defendant and refused may be objectionable, as calculated to mislead the jury, yet the substantial question presented to the court on both sides is, whether the plaintiff, to maintain his action, should satisfy the jury by evidence that he was ready to perform his part of the contract. The promise on the part of the defendant to deliver the corn to the plaintiff at a time and place, and the promise on the part of the plaintiff to accept and pay the defendant for the corn at the price agreed on such delivery, are dependent undertakings. The obligation to deliver, and the obligation to pay, are concurrent. If Rawson was not ready to accept and pay for the corn, Hough was not bound to deliver it. Where in a contract like this the defendant undertakes to convey and deliver at a particular time and place, to be paid for on such delivery at a stipulated price, the plaintiff to maintain his action

must aver and prove that he was ready to receive and pay for the property according to his undertaking. He must not be in default himself, but must show a readiness to perform on his part before he can compel the defendant to show performance, or respond in damages. * * *

Judgment reversed and cause remanded.

CLARK v. WEIS.

1887. 87 Ill. 438.

SCHOLFIELD, J.—On the 27th of April, 1864, appellant executed and delivered to appellee his penal bond for $2,000, subject to the condition that he should make and deliver to appellee a deed, with usual covenants of warranty, for a certain tract of land, on or before the 27th of April, 1866, provided appellee paid him therefor the sum of $1,717, with interest at 10 per cent.

Appellee paid appellant $100, at the time of the execution of the bond, and $500 about three months thereafter.

The declaration contains two counts. The first is special, on the bond, and the second is for money had and received by appellant to appellee's use.

The issues presented by appellant's pleas were, 1st, general issue, 2d, statute of limitations, and 3d, set-off; but since appellant only questions the sufficiency of the evidence, and the ruling of the court in respect of the tender and payment by appellee, in performance of his part of the contract, it will only be necessary to notice those questions. Appellant asked the court, and the court refused, to instruct the jury as follows:

"The material issues in this case, on the part of the plaintiff, are, a contract, payment and tender of payment by the plaintiff in full performance of his part of the contract as stated in his declaration and replication; and unless the jury believe, from the evidence, that the plaintiff has sustained said issues by a preponderance of proof, then the law is for the defendant, and the plaintiff cannot recover.

"In order to make a legal tender of money, as stated in plaintiff's declaration, the exact amount of money then due must have been actually produced by the plaintiff, in lawful money, and by him offered to the defendant; and unless the jury believe, from the evidence, that such a tender was made by the plaintiff to the defendant, as stated in said declaration, then the law is for the defendant, and the plaintiff cannot recover.

"In order to have the advantage of a tender of money, the party making the tender must keep it good."

The evidence very clearly shows that appellant never was in a condition to make a good title to the property to appellee. His claim of title rested upon a deed which is shown to have been a mortgage, in fact, and since satisfied, though not formally released. Besides, appellant had, by quitclaim deed, expressly disposed of all his interest in a part of the property at the time the bond was executed, and at no time subsequently did he repossess himself of the title, or offer to do so. A portion of the property was also in the actual occupancy of the party claiming to be the real owner (the mortgagor), and so remained. This party neither was legally dispossessed, at any time, nor does it appear that he could have been.

Under this state of facts, we think the court very properly refused the instructions.

The promises of the parties here were mutual and dependent, and, as a clear exposition of the law applicable, we quote from the opinion of Storrs, C. J., in Smith v. Lewis, 26 Conn. 110: "As the agreement required only that the acts of both the parties should be done at the same time, neither was obliged to do the first act, or consequently to perform his part of the agreement without or before the other. The plaintiff, in order to sustain this action, need only to show that he did what the law required of him; and all that it required was, that he should be ready and willing to perform on his part, if the defendant was ready to perform on his.

"Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability and notice are sufficient evidence of, and indeed imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is, in its nature, conditional only, and dependent on, and to be performed only in case of the readiness of the other party to perform his part of the agreement."

Hough v. Rawson, 17 Ill. 588, and Smith v. Lamb, 26 *id.* 396, are in accordance with this view of the law. The latter case differs from the present only in the fact that there the party refused to con-

vey, admitting that he had no title, while here the party did not convey, and the evidence shows that he had no title—a difference entirely unimportant in principle.

Appellee testifies that he was ready and willing and prepared to comply with his part of the contract, whenever appellant complied with his, and that he so notified appellant on repeated occasions. It is impossible to say the jury manifested either ignorance, passion or prejudice in choosing to believe him.

We think there was no substantial error in the ruling of the court in granting, refusing, or modifying instructions, and that the verdict is authorized by the evidence.

The judgment is affirmed.

ANGLE v. HANNA.

1859. 22 Ill. 429.

WALKER, J.—The principle is well established and fully recognized, that a party who engages to labor for a specified period, has no right to recover unless he performs his contract, or is excused by the employer, or is in some manner justified in quitting before the expiration of the time. If the employe is prevented from performing his contract by the employer, or is discharged from his employment, or is from ill usage compelled to abandon his service, he may then recover on a *quantum meruit*. But, unless he is thus excused or prevented, he has no such right. In this case, the engagement was to labor four months, at $18 per month, or from the 14th of May until the first of October, 1857. After entering upon the performance of the contract, appellee quit work for the appellant about the 6th or 7th of August, 1857. There is no evidence in this record showing that the appellant discharged or in any manner excused the appellee from completing the performance of the contract. And it fails to show ill usage, but on the contrary it appears that he was well treated, and that he at no time complained of his treatment, of his board or of his lodgings. And the only excuse which he made, after leaving, was that cutting flax with a machine was too hard work. And from his statement and other evidence, the appellant was engaged with him at the same labor. He was employed on the farm in the performance of labor incident to that occupation, and he had no right to insist upon the right to perform only the lighter portions of it, and an exemption from the more onerous portions. If he had not been willing to perform such labor as is usual and customary on a farm, he should have stipulated in his contract for an exemption from its performance. * * *

The appellee has wholly failed to show a right of recovery; he

having violated his part of the agreement, without any legal excuse, the finding of the jury was wrong, and unsustained by the evidence. The court below erred in not granting a new trial. The judgment must be reversed, and the cause remanded.

BEDOW v. TONKIN.

1894. 5 S. Dak. 432, 59 N. W. 222.

CORSON, P. J.—* * * The learned counsel for the appellant contend that the court erred in charging the jury that the plaintiff was entitled to recover if they found he contracted to work for the defendant for eight months, and left the service of his employer, without cause, before the expiration of the time; and he insists that the weight of authority is that, under such circumstances, the contract is an entirety, and, without proof of a full compliance with his contract, the plaintiff is not entitled to recover in this action. This is a new question in this state, and, as we have said, is an important one. Under the strict doctrine of the earlier cases, the instructions of the court could not be sustained. That doctrine was thus tersely stated by Morton, J., in Olmstead v. Beale, 19 Pick. (Mass.) 528: "The plaintiff cannot recover on his express contract, because he has not executed it on his part, and the performance is a condition precedent to the payment. He cannot recover on a *quantum meruit* for the labor he has performed, because an express contract always excludes an implied one in relation to the same matter." But the learned circuit court, in his instructions in this case, followed the rule laid down in Britton v. Turner, 6 N. H. 481. A synopsis of Mr. Justice Parker's opinion in that case was given by Mr. Parsons in his work on Contracts, from which we quote a portion: "But if, upon a contract of such a character, a party actually receives useful labor, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of the excess. And the rule is the same whether the labor was received and accepted by the assent of the party prior to the breach, and under a contract which, from its nature, the party was to receive the labor, from time to time, until the completion of the whole contract, or whether it was received and accepted by an assent subsequent to the performance of all that was in fact done. In case such contract is broken, by the fault of the party employed, after part performance has been received, the employer is entitled, if he so elect, to put the

breach of contract in defense for the purpose of reducing the damages, or showing that nothing is due, and the benefit for which he is liable to be charged in that case is the amount of value which he has received, if any, beyond the amount of damage; and the implied promise which the law will raise is to pay such amount of the stipulated price for the whole labor as remains after deducting what it would cost to procure a completion of the whole service, and also any damage which has been sustained by reason of the non-fulfillment of the contract. If, in such case, it be found that the damages are equal to or greater than the amount of the value of the labor performed, so that the employer, having a right to the performance of the whole contract, has not, upon the whole case, received a beneficial service, the plaintiff cannot recover." The American editor of Chitty on Contracts says of this opinion that it is "manifestly just and sensible." 2 Pars. Cont., p. 38. It will thus be seen that the court in Britton v. Turner entirely ignored the old common-law doctrine that the contract was an entire one, and that a party could not recover unless he could show that he had performed his contract, and served the full time for which he had contracted. That case stood alone for many years, with the exception of a recognition of the principles therein enunciated by the supreme court of Vermont in Fenton v. Clark, 11 Vt. 560, and Gilman v. Hale, *id.* 510. But the doctrine of that case has, in later years, been received with favor by the courts, and has been followed by the supreme court of Texas, in Hillyard v. Crabtree, 11 Tex. 264; of Iowa, in Pixler v. Nichols, 8 Iowa 106; of Kansas, in Duncan v. Baker, 21 Kan. 99; of Nebraska, in Parcell v. McComber, 11 Neb. 209, 7 N. W. 529. In McClay v. Hedge, 18 Iowa 66, Judge Dillon, in speaking of this doctrine, says: "This question was settled in this state by the case of Pixler v. Nichols, 8 Iowa 106, which distinctly recognized, and expressly followed, the case of Britton v. Turner, 6 N. H. 481. That celebrated case has been criticised, doubted, and denied to be sound. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases. With the known and natural disposition of courts and juries to disfavor the cause of him who has broken his contract, and yet seeks a recovery, and with the limitations stated in Pixler v. Nichols, the application of this rule will not be found practically to work injustice to the employer or contracting party who is without fault." Mr. Parsons, in his work on Contracts, thus comments with apparent approval upon the case of Britton v. Turner, and says: "The case of Britton v. Turner, 6 N. H. 481, resists the whole doctrine of the cases, and permits the servant to recover on a *quantum meruit*. His right to recover is carefully guarded in this case by principles which

seem to protect the master from all wrong, and to require of him only such payment as is justly due for benefits received and retained, and after all deduction for damages he may have sustained from the breach of the contract. So guarded, it might seem that the principles of this case are better adapted to do adequate justice to both parties, and wrong to neither, than those of the numerous cases which rest upon the somewhat technical rule of the entirety of the contract. It is certain, however, that, since this case was reported, the same question has been again considered in other courts, and decided in conformity with the earlier decisions." The doctrine of the case of Britton v. Turner seems eminently right and just, and commends itself to our favor. Much less injustice is liable to be done under the doctrine of that case than under the more strict and rigid rules formerly prevailing, as laid down in Olmstead v. Beale, *supra,* by which a party who had failed to perform his contract to the letter was denied all remuneration for the services rendered. The instructions of the court below are, in our opinion, correct, and are fully supported by reason and authority, with one exception. The court omitted a qualification that should have been inserted, namely, that in no case can the party recover more than the compensation stipulated for in the contract. Parcell v. McComber, *supra.* But this omission was not prejudicial in this case, as it is quite apparent from the verdict that the jury found that the contract was for six months, and not eight months, and only allowed the plaintiff the stipulated wages of $20 per month. The judgment of the circuit court is affirmed.

PAINE v. BROWN.

1867. 37 N. Y. 228.

DAVIES, C. J.—The plaintiff, as assignee of one Calvin T. Chamberlain, brings this action to recover the sum $2,000, being the amount of the first payment to be made upon a contract for the sale by Chamberlain and the purchase by the defendant of one-fifth of the Indiana Central canal. * * *

By the terms of this contract, Chamberlain, the assignor of the plaintiff, bound himself to sell and convey by deed of release the property described to the defendant for the sum of $10,000, and the defendant agreed to purchase the same and pay that price therefor. No time was fixed by the contract for the conveyance of the property, but the defendant was to pay $2,000 of the purchase money in the month of July, 1859, and the remainder in one and two years, with interest from May 1, 1859.

This case is not unlike that of Pordage v. Cole, 1 Saund. 319, and

is clearly within the doctrine there settled. That was an action of debt, on specialty, for £774 15s. The agreement was in these words: "11 May, 1668. It is agreed between Doctor John Pordage and Bassett Cole, Esquire, that the said Bassett Cole shall give unto the said Doctor £775 for all his lands, with Ashmole House thereunto belonging, with the brewing vessels as they are now remaining in the said house, and with the malt mill and the wheelbarrow. In witness whereof we do put our hands and seals, mutually. Given as earnest in performance of this, 5s, the money to be paid before midsummer 1668; all other movables, with the corn upon the ground, excepted."

There was a demurrer, and it was contended, on the part of the defendant, that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance on his part, and in this case it was a condition precedent which ought to be performed before the action brought. But it was adjudged by the court that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty, and if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land, and each party has a mutual remedy against the other.

Sergeant Williams, in his learned note to this case, says: "It is to be observed that covenants are to be construed to be either dependent or independent of each other according to the intention and meaning of the parties and the good sense of the case, and that in order to discover that intention, and learn with some degree of certainty when performance is necessary to be averred in the declaration and when not, it may not be improper to lay down a few rules. First, if a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen, or *may* happen *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy and did not intend to make the *performance* a condition precedent, and so it is where *no time* is fixed for the performance of that which is the consideration of the money or other act." And he adds: "This seems to be the ground of the judgment in this case (Pordage v. Cole), the money being appointed to be paid on a fixed day, which might happen before the lands were or could be conveyed. But, second, when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. Third, when a covenant goes only to a part of

the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. Fourth, where two acts are to be done *at the same time,* as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act." To the same effect, see Campbell v. Jones, 6 Tenn. 570.

The principles here enunciated have received the approval of the courts of this state in the following cases: Robb v. Montgomery, 20 Johns. (N. Y.) 15; Tompkins v. Elliott, 5 Wend. (N. Y.) 496; Harrington v. Higgins, 17 *id.* 376; Evans v. Harris, 19 Barb. (N. Y.) 416; Grant v. Johnson, 5 N. Y. 247.

In Robb v. Montgomery, *supra,* the supreme court said: "Where the payments are to precede the conveyance, it is no excuse for nonpayment, that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so on receiving a good title, and then it must be made to him or the contract will be rescinded. Here the defendant never offered to pay and never demanded a conveyance; and therefore it furnishes no bar to the suit that at a certain period the plaintiff had not the title."

In Grant v. Johnson, *supra,* the question was whether the plaintiff could sustain an action for the second installment of the purchase-money secured by the agreement, without averring and proving the delivery, or an offer to deliver, a deed of the premises. This court said: "The parties have declared that certain payments were to be made and certain acts performed by them respectively at the times specified in the agreement. They must be held to have intended the performance of these acts, where and of course in the order of time indicated in their covenants." So, in the case at bar, the covenants to pay the purchase-money in the installments mentioned, were all independent of and intended by the parties to precede the actual conveyance of the property described. The covenant to pay the $2,000 in July, 1859, was independent of and to precede any act to be done or performed by the assignor of the plaintiff. Upon the defendant's breach an action accrued to the assignee of the plaintiffs, and no sufficient defense was interposed.

These views conclusively show, that the exceptions to the charge of the judge to the jury were properly overruled, and that the plaintiff was entitled to judgment upon the verdict.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

KANE v. HOOD

1832. 13 Pick. (Mass.) 281.

SHAW, C. J.—This is a contract not under seal, but the same rules govern the construction of it as those applicable to cases of covenant. The only question which would seem to be presented by the facts is, whether in a contract between parties, relative to the same subject matter, some stipulations may be mutual and independent, and others dependent and mutually conditional; and this question was settled in the case of Couch v. Ingersoll, 2 Pick. (Mass.) 292. Indeed the point in question, constituted distinctly the ground of decision in that case, because the plaintiff, without having tendered performance on his part, recovered on a breach of one covenant because it was independent, and failed on the other, because upon the construction put upon it by the court, it was independent.

In the present case, the two first installments of the purchase money were to be paid before the time fixed for the conveyance of the land, and therefore it is very clear they are independent. Had a suit been brought for either of them, no tender, offer, or averment of readiness, would have been necessary, and no defense could have been made. The obligation of the defendant to pay the money at the times stipulated, was absolute and unconditional. But it is shown by the facts, that the two first installments were fully paid; and though payment was not made at the times fixed, yet it was afterwards accepted, and the plaintiffs affirmed the contract by suing on it. Then the question is, whether the payment of the last installment on the one side, and the execution and tender of the deed, upon the payment being made, on the other, were not dependent and conditional, and we think they were. The words are, "and the other half in two years, with interest annually, and the deed to be executed at the completing of the last payment." Suppose the whole had been payable at once, instead of being payable by installments, and the stipulation had been to pay $700 in two years, the deed to be executed at the payment; upon this statement of the question, is there a doubt that the agreements would have been mutually dependent and conditional? I think not. The intent of the parties is to govern. And what difference is there, whether the final payment is the whole or part, the remainder of the purchase money having been paid and accepted? Where the whole purchase money is to be paid at once and the deed is to be then given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration, without having the equivalent, in a title to the land purchased. The same reason applies to the last installment. An obvious reason why the

first and second installments should be paid without having a deed is, that the vendor was to withhold the title, as a security for the purchase money, and the vendee was content to rely on the vendor's contract for his future title; but no such reason applies to the final and complete payment of the purchase money. Whether therefore we consider the particular language of the contract, or the general intent of the parties, we think these parts of the contract were mutually dependent and conditional, and the plaintiffs cannot recover without averring performance or an offer to perform on their part.

NEW ORLEANS v. TEXAS & PACIFIC RY. CO.

1898. 171 U. S. 312.

FULLER, C. J.— * * * The general principles in respect of conditions precedent are set forth sufficiently for the purposes of this case by Chief Justice Shaw in Proprietors of Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) 440, cited by appellant. Where the undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been understood by the parties and is to be collected from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. * * *

§ 99 (6)—Failure of Performance in a Matter Considered Essential to the Continuance of the Contract.

SKEEN v. PATTERSON.

1899. 180 Ill. 289, 54 N. E. 196.

MAGRUDER, J.—* * * It is to be observed that, in this contract, time is expressly declared to be of the essence of the agreement; and the contract also provides, that all deeds are to be passed and the negotiation is to be closed on or before March 1, 1897. Hence, it was the duty of appellee before March 1, 1897, not only to tender a warranty deed of her property to the appellant, but also to pay off the interest of $130 due January 4, 1897, and to pay to appellant the taxes upon his Oak Park property for 1896, which she had assumed to pay by the terms of the contract. The evidence shows, that appellee was informed at the time the contract was executed, that appellant had already paid the taxes of 1896, and that she agreed at that time to refund to appellant the amount of the taxes so paid by him for that year.

A party cannot compel the specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed all the acts, which form the consideration for the undertaking on the part of the defendant; and where the parties have made the time of the performance of a contract material, a court of equity has no power to enforce its specific performance contrary to their clearly expressed intentions. It is the duty of courts to give effect to existing contracts, and not to make new ones for parties. (Stow v. Russell, 36 Ill. 18.)

In Heckard v. Sayre, 34 Ill. 142, we said (p. 150): "A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident or mistake has intervened."

In Short v. Kieffer, 142 Ill. 258, we said (p. 266): "The elementary rule that, before one party to a contract can call upon the other to perform, he must show that he is not in default himself, applies with peculiar force and strictness in all bills for specific performance." This court has always held, that a provision in a contract for the sale or exchange of land, making time of the essence of the agreement, will not be dispensed with but will be enforced, except under very peculiar circumstances, which do not exist in the present case. (Phelps v. Illinois Central Railroad Co., 63 Ill. 468.) Under a bill, which prays for the specific performance of a contract for the sale or purchase of land, the burden of proof is upon the complainant to show full performance on his part. Dupuy v. Williams, 152 Ill. 102.) * * *

CARTER v. PHILLIPS.

1887. 144 Mass. 100, 10 N. E. 500.

MORTON, C. J.—This is in the nature of a bill for specific performance. The parties in October, 1885, entered upon a joint enterprise for the manufacture and sale of cloaks and other garments, under a written contract which contained the following clause: "And by and between the above-named persons it is mutually agreed that the agreement may be terminated by either party, by giving to the other sixty days' notice in writing of the desire so to do; but, upon such notice by the said Phillips, he hereby agrees to give to said Carter the right and privilege to purchase, within the limit of time of such notice, the said business, at the cost price of the stock, of the fixtures, and machines, and the lease of the premises Nos. 35 and 37 Winter street, in said Boston, under the terms and provisions thereof; the said Carter paying therefor the proper and fair proportion of any assessments and taxes assessed or laid on said premises, and any and all expenses incurred in connection with said lease, which the said Carter hereby agrees to do." The bill seeks the specific performance of this clause. Upon the hearing before a single justice, he ordered the bill to be dismissed, and the plaintiff appealed.

It appeared in evidence that on February 26, 1886, Phillips gave to Carter a written notice in these words: "I give you sixty days' notice to leave my employ." Though not in the words of the contract, it is clear that this was intended as a notice of his desire to terminate the contract, and it was so understood by Carter; for on April 26, 1886, he writes Phillips: "I have decided to avail myself of the right and privilege given me in our agreement of October 1, 1885, to purchase the business." In the same letter he asks Phillips to join with him "in ascertaining the cost and the amount to be paid by me;" but he made no tender or offer to pay the amount, and the evidence justified the presiding justice in finding that he had not the means or ability to pay for the business, either at that time or at any time before the bringing of his bill. The contract provides that he should have the privilege of purchasing within sixty days after the notice by Phillips. As he did not offer, and was not able and ready, to perform his part of the contract, he cannot insist upon a performance by the defendant, if the rights of the parties are governed by their contract. Irvin v. Gregory, 13 Gray (Mass.) 215.

But the plaintiff contends that time is not of the essence of the contract, and that, in equity, he ought to be permitted to perform his part of the contract within a reasonable time after the expiration of the sixty days. The equitable doctrine to which the plaintiff appeals has been recognized and acted upon in many cases in this court. As was observed by Mr. Justice Gray in Barnard v. Lee, 97 Mass. 92,

this doctrine was formerly carried to an unreasonable extent, but in modern times it has been more guardedly applied; "and it is now held that time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by a change in the value of the land, or other circumstances which would make a decree for the specific performance inequitable."

In Goldsmith v. Guild, 10 Allen (Mass.) 239, where the plaintiff agreed to pay for land "within ten days" from the date of the contract, it was held that time was of the essence of the contract, as the land was fluctuating in value from day to day. Mr. Justice Chapman says in the opinion: "But this doctrine applies to sales of property only, in cases where time is immaterial to the value, and is urged only by way of pretense and evasion, and does not apply to a sale of property the value of which is subject to daily fluctuations."

In applying this doctrine to any contract, a court of equity seeks to look through the language used, to the real intentions and purposes of the parties; and if a time for performance is stipulated in the contract, and it appears that the parties intended to make such time an essential element of their agreement, the court will carry it into effect. To do otherwise would be to enforce a different contract from that which the plaintiff made. In the case before us, the contract carefully stipulates the time of the notice for terminating it. It appeared in evidence that it was a matter of discussion between the parties at the inception whether the time should be fixed at thirty or sixty days. It also appeared that, after giving the notice, when about half of the sixty days had expired, Phillips called Carter's attention to the notice, and urged him, if he intended to make the purchase, to be making his preparations to do so, and that Carter asked for an extension of the time,—all of which goes to show that the parties considered the sixty days' time as an essential element of their contract, and the situation of the parties tends to show the same thing. * * *

Decree affirmed. Bill dismissed, with costs.

WATSON v. WHITE ET AL.

1894. 152 Ill. 364, 38 N. E. 902.

BAKER, J.—* * * By the terms of the agreement here in question time was made of the essence of the contract. It was not only provided therein that if the purchaser should fail to perform the contract promptly on his part, at the time and in the manner therein specified, then that "the earnest money paid as above,"—

i. e., the $500 first paid by White,—should, at the option of the vendor, be forfeited as liquidated damages and the contract become null and void, but it was also expressly stipulated, "time is of the essence of this contract and of all the conditions thereof." But an agreement that time shall be of the essence of a contract may be waived or set aside, and more especially so in the contemplation of a court of chancery, either by the mutual consent or conduct of the parties, or by the consent or conduct of the party in whose favor and for whose benefit such stipulation is made. (Allen v. Woodruff, 96 Ill. 11; Palmer v. Ford, 70 *id.* 369; Peck v. Brighton Co., 69 *id.* 200; Morgan v. Herrick, 21 *id.* 481; Bishop v. Newton, 20 *id.* 175.) In the case at bar, both parties, by tacit but mutual consent, seem to have waived and ignored, from the very start, the provision that time should be of the essence of the contract and of all the conditions, stipulations or specified terms thereof. The substance of one stipulation was, that the purchaser should have only ten days after the abstract of title was furnished him in which to examine for, discover and report material defects in the title. But, as matter of fact, the purchaser or his attorney did not give to the vendor or his agents notice of the defects claimed to be material defects until twenty-eight days after the abstract was delivered, and yet neither the vendor nor his agents assumed or attempted to declare a forfeiture of the contract or of the $500 earnest money, or even complained of the delay. * * *

NORRINGTON v. WRIGHT.

1885. 115 U. S. 188.

GRAY, J.— * * * In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 B. & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. (U. S.) 728; Davison v. Von Lingen, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall

be shipments or deliveries of so many distinct quantities of iron. Mersey Co. v. Naylor, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill; in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight." Brawley v. United States, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been

shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon v. Bertram, 20 How. (U. S.) 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. * * *

LEOPOLD ET AL. v. SALKEY.

1878. 89 Ill. 412.

SCHOLFIELD, J.—This was an action by appellee against appellants, upon a written contract, under seal, whereby the former agreed to render personal services for the latter, during a stipulated term, for a price agreed to be paid by the latter.

By the terms of the contract, appellee agreed to enter the employ of appellants as a superintendant and manager of the manufacturing department of appellants (they being engaged in the manufacturing and selling of boys', youths' and children's clothing), in connection with, and under the direction of Asher F. Leopold, and whenever required by appellants' firm or either member thereof, to assist in the purchase and sale of materials and goods manufactured by the firm, in such manner and at such times as the firm should direct. Appellee also agreed that he would continue in the employe of the firm for a period of three years from the 1st day of December, 1874, at which time his services were to commence; that during said time, he would devote himself entirely to the business of the firm, in the manner as agreed upon, giving his whole time, attention and skill thereto, and at all times work for the best interest of appellants.

Appellants, as a compensation therefor, agreed to pay appellee the sum of $3,000 per annum, in sums of $250 per month, at the expiration of each month.

Appellee commenced work, under the contract, on the 1st of December, 1874, and continued to render services thereunder until the 12th of January, 1875, when he was arrested by a United States marshal, under an order of the district court of the United States for the northern district of this state, and put in jail. He remained in jail until the 25th of the same month, when he was released on bail. Upon being released, he returned to appellants' establishment to resume work under the contract, but they, having obtained another foreman in his place whilst he was in jail, refused to receive him again into their employ.

Appellee has been paid for all the services he actually rendered, and the present suit is only to recover damages for appellants' alleged breach of contract in not continuing him in their employ.

The judgment below was in favor of appellee for $500.

The covenants of appellee clearly constitute but one single and entire undertaking—each goes to the whole consideration.

The covenant of appellants to pay $3,000 per annum, although to be paid in monthly payments, was not for a part, but for the whole of the term. The covenant by appellee that he would devote himself entirely to the business of the firm, giving his whole time, attention and skill thereto, goes to the root of the whole matter, and when the situation of the parties, as disclosed by the evidence, is taken into consideration, it is manifest that the failure by appellee to perform his contract from the 12th to the 25th of January, inclusive, would render the performance of the rest of the contract by appellee a thing different, in substance, from that which appellants stipulated for. Appellants were engaged in an extensive business in the manufacturing and selling of boys', youths' and children's clothing. The month of January was their busiest season of the year. In that month they manufactured their goods for the spring trade, and in the latter part of it they sent out their traveling men with samples. When appellee was arrested there were in appellants' employ fourteen cutters and three trimmers. It was his duty as superintendant and manager to superintend these, lay out their work, direct its performance, etc., and also to inspect and receive work from the tailors, besides discharging various other duties incident to the position he assumed. It required peculiar skill, knowledge and great promptness and fidelity. To delay the manufacturing in that month would, obviously, work immediate pecuniary loss, to some extent, and must, necessarily, materially endanger the future prosperity of the business. Rival manufacturers would be enabled to forestall appellants in the trade of that year, and being once forestalled, they might not, during the term, recover their former trade; besides, the character and quality of work have much to do in building up and establishing a prosperous permanent trade in manufactured articles, and great risk, in that respect, would be incurred by the mere change of superintendents and managers; nor is it to be assumed that a person of

competent experience, skill, energy and fidelity could be got, without a moment's warning, to fill such a position, and induced to stay, from day to day, during such a season in the business, for a compensation approaching in any reasonable degree a pro rata part of that which he would be willing to accept for his services for a term of three years.

In our opinion, therefore, the failure of appellee to perform the services he had covenanted to perform, from the 12th to the 25th of January, 1875, was a substantial breach of his covenant.

Appellee has averred in his declaration, ability, readiness, and offer to perform, and his undertaking being an entire one, it was incumbent on him to make the averment and support it by proof. Badgley v. Heald, 4 Gilm. (Ill.) 64; Swanzey v. Moore, 22 Ill. 63. * * *

It may be conceded that appellee was put in jail without his fault, yet, this would not relieve him of his covenant to give his whole time, attention and skill to appellants' business. It is not claimed to have been through appellants' fault that he was put in jail, and there is no reason, therefore, why appellants' business should suffer in consequence of it. He might have guarded against this by an exception in his covenant, but he did not do so.

The rule is, it is a good defense to an action on a covenant or contract, that the obligation to perform the act required was dependent upon some other thing which the other party was to do and has failed to do. And the defense is good, although the omission of the other party to do the thing required of him, was produced by causes which he could neither foresee nor control. 2 Parsons on Conts. (6th ed.) 674; Chitty on Conts. (11Am. ed.) 1086.

There is a class of cases, where a party contracting to render personal services, after part performance, becomes disabled by inevitable casualty and is thereby prevented from fully completing his contract, has been held entitled to recover for the services actually rendered, upon a *quantum meruit*. Fenton v. Clark, 11 Vt. 557; Hubbard v. Belden, 27 *id.* 645; Dickey v. Linscott, 20 Me. 453; Wolf v. Hewes, 20 N. Y. (6 Smith) 197. But these furnish no warrant for the position that the laborer can, in such case, recover upon the contract for a failure to pay for future services which he has been prevented from performing. On the contrary, they proceed upon the theory that the contract is discharged by the inevitable casualty, and therefore allow the party to recover simply what he has earned.

Another class of cases may be found, where a party attempting to rescind a contract on account of the default of the opposite party, is held precluded by his acceptance of the property, labor, etc., of the opposite party. But such cases can have no application here. In those cases it is required that it shall be in the power of the party to abandon the materials or product of labor received and rescind the

contract *in toto,* without an abandonment of his own property, and his failure to thus abandon them is construed as an acceptance of performance. See Eldridge v. Rowe, 2 Gilm. (Ill.) 91. * * *

The general remark made by the court, in discussing the evidence, which counsel quote (from Selby v. Hutchinson, admr. 4 Gilm. (Ill.) 333), that "in order to justify an abandonment of the contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default," is not understood as laying down the rule that to justify an abandonment of a contract the opposite party must have failed to discharge every obligation imposed on him,—but simply that matters which do not go to the substance of the contract, and the failure to perform which would not render the performance of the rest a thing different in substance from what was contracted for, do not authorize an abandonment of the contract; for, when the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised, the authorities all agree the party not in default may abandon the contract.

It is said in Wood's Law of Master and Servant, p. 233, § 120: "Sickness for a lengthened period—in one case two weeks—releases both parties from the contract. The master is not bound to wait, unreasonably, for the restoration of his servant's health, and his necessities may well be regarded as the measure of what is reasonable." See, also, Hubbard v. Belden, *supra.*

In Poussard v. Spiers and Pond, Law Reports (Q. B. Div.), Vol. 1, p. 410, this rule is, in substance, recognized and applied by the court.

Where neither party is at fault, the absence of the servant from the master's employ, without his consent (by whatever cause occasioned), for an unreasonable length of time, we are of opinion authorizes the master to treat the contract as abandoned; and what, in such case, is an unreasonable length of time, depends upon the nature and necessities of the business in which the servant is employed. Under the facts here proved, a much shorter time than that during which appellee was confined in jail, might, in our opinion, be regarded as unreasonable. Under different circumstances, absence for a much greater length of time might furnish no cause for abandonment—the question always being, does the delay so affect the interests of the master that the performance of the residue of the contract by the servant would be a thing different in substance from what the master contracted for. * * *

Judgment reversed.

PITTENGER v. PITTENGER.

1904. 208 Ill. 582.

MAGRUDER, J.—The issues, presented by this record, are principally issues of fact. On September 14, 1898, the father and mother of appellant executed to him a deed of their homestead farm, consisting of eighty acres, upon condition that he would support them during their natural lives, and furnish and supply them with the reasonable comforts and necessaries of life, suitable to their condition, including such medicines and medical attendance as they might require, giving them the right to retain the possession of the premises as their home free of charge, to be kept by them until their death, unless by further agreement thereafter some other arrangement for their home should be made; and also that he would pay them the sum of $100 in money per year. * * * A slight or partial neglect on the part of one of the contracting parties to observe some of the terms or conditions of the contract will not justify the other party in abandoning or rescinding the same. A deed or contract, made in consideration of the support of the grantors, will only be set aside in equity where there has been an entire failure or refusal to perform the agreement, or at least such a substantial failure to perform the contract in respect to material matters as would render the performance of the rest a thing different from what was contracted. As was said in Weintz v. Hafner, 78 Ill. 27: "Appellee had no right to rescind the contract and recover the purchase money paid, unless appellant had failed, in a substantial manner, to observe his part of the contract. A slight or partial neglect on the part of one of the parties to a contract to observe some of the terms or conditions thereof, will not justify the other party to at once abandon the agreement. As was said in Selby v. Hutchinson, 4 Gilm. (Ill.) 319, in order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself." (See also Leopold v. Salkey, 89 Ill. 412; City of Elgin v. Joslyn, 136 *id.* 525.) We think that, under the evidence here, an effort was made by the appellant in good faith to effect a substantial compliance with the agreement and that such effort was successful. The evidence tends to show that Mrs. Pittenger, who was an old lady upwards of eighty years of age at the time when most of these transactions occurred, would become dissatisfied with persons living with her, so that they were obliged to leave. Many of her complaints,

which seemingly reflected upon the conduct of the appellant, were, as matter of fact, due to the whims and fancies of old age, and a feeling of loneliness natural to her after the death of her husband. She declined appellant's offer to take her to his home, and to give her the best room in his house, if she desired it. But when she remained in her own home, or went elsewhere, she was always supported by the appellant at his own expense, and, as we read the testimony, adequately and comfortably. In addition to this, there is abundance of testimony in the record proving declarations which were made by the appellee, Julia A. Pittinger, as to the appellant's kindness to her. Before she fell under the influence of her son, Charles, she frequently stated to other people—who so testify—that the appellant had done all for her comfort, which she could ask, and furnished her with all the necessaries, which she required. * * *

PALMER v. MERIDEN BRITANNIA CO.

1901. 188 Ill. 508, 59 N. E. 247.

MAGRUDER, J.—This action is brought to recover the sum of $5,000, which, by the terms of the lease, the lessors were to pay to the lessee at the end of the term for the building erected upon the premises, with its fixtures and appurtenances, "on being put in possession thereof." Hotchkin and Palmer were to pay said sum of $5,000 "at the end of the said term, if the said lessee shall have duly fulfilled all its covenants and agreements herein contained, and if the said building, to be erected as aforesaid and maintained or renewed as aforesaid, shall remain on such ground in the condition above stipulated for." It is not denied by the appellant, that the appellee paid all the rent during the term called for by the terms of the lease; nor is it denied by the appellant that, at the end of the term, the appellant was put in possession of the building, costing over $30,000, which appellee erected upon the premises during the term. The defense, set up by the appellant, is that the building erected upon the premises by the appellee, was not, in certain particulars, such a building as the terms of the lease called for, and that, therefore, the appellee did not fulfill all its covenants and agreements, and that the building did not remain upon the ground at the end of the term in the condition stipulated for. The contention of the appellant is, that the agreement of the appellee to construct a building, which should be internally finished in a particular way, was a condition precedent to the right of appellee to recover the sum of $5,000, and that, appellee, not having performed the condition precedent named in the covenant, is not entitled to be paid the sum named for the building erected by it. * * *

In construing covenants in an agreement, such covenants will be regarded as conditions precedent, or as independent agreements, according to the intention of the parties and the good sense of the case, and technical words give way to such intention. (Davis v. Wiley, 3 Scam. (Ill.) 234; Leake on Contracts 567.) A fair construction of the lease in question leads to the conclusion, that it could never have been the intention of these parties to permit the lessors to receive over $100,000 in rent during a period of more than ten years, and to receive and take possession of a building costing over $30,000, and then to defeat an action for $5,000, the agreed price of such building, merely because appellee had broken a covenant to cement the floor of the basement with Portland cement, and to lath and plaster the walls and ceiling of the basement. Such a construction would not be within "the good sense of the case."

It is further to be observed that, if the appellee has broken its covenant in this case, it has broken its covenant as to a part of the consideration only. The consideration, moving from the lessors in the execution of the lease, is the lease of the State street lot for ten years and the promise to pay $5,000 for the building to be erected by the lessee. The consideration, moving from the lessee, is its covenant to pay $100,000 in rent during the term, and its other covenants to erect a building, to keep it insured, to pay taxes, to renew the building in case of fire, etc., and to surrender the building in good repair at the end of the lease. It is admitted, that the appellee has performed the substantial part of its covenants. The appellant refuses to pay the $5,000 upon the alleged ground that performance by the lessee of the terms of its covenants is a condition precedent to its right to recover from him. Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenants can be compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment, or in a separate action.

In Nelson v. Oren, 41 Ill. 18, we said (p. 23): "Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration." (White v. Gillman, 43 Ill. 502; Newsom v. Smythies, 3 Hurl. & Norm. 840). Where there are a number of covenants on each side, the enjoyment by one part of a substantial performance by the other has been held by the courts to prevent his insisting upon the non-performance of that which was originally a condition precedent. (Pust v. Dowie, 32 L. J. Q. B. 179.) In Pust v. Dowie, *supra*, it was said: "If, indeed he has received the whole or any substantial part of the consideration for the promise on his

part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, namely, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages." Carter v. Scargill, 10 L. R. Q. B. 564; Benjamin on Sales (Bennett) 515, § 564.) In Benjamin on Sales, *supra,* the reason of this rule is given as follows: "It would be unjust under such circumstances that a party, who has received a part of the consideration for which he bargained, should keep it, and pay nothing because he did not receive the whole. The law, therefore, obliges him to perform his part of the agreement, and leaves him to his action for damages against the other side for the imperfect performance of the condition." (2 Chitty on Contracts, 1084; Beach on the Modern Law of Contracts 134, § 107; Wiley v. Inhabitants of Athol, 150 Mass. 426; Lowber v. Bangs, 2 Wall. (U. S.) 728.) In Wiley v. Inhabitants of Athol, *supra,* it was said: "Although conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect of the defective performance."

In applying this doctrine to the case at bar, it will be seen that the appellant charges the appellee with the breach of a condition precedent in failing to construct the building in certain specific particulars, as required by the lease. Appellee's covenant to so construct the building was but a small part of the total consideration for the promise to pay the $5,000. Appellee performed the substantial part of its contract by erecting a building, costing more than $20,000, and paid $100,000 of rents, and paid all taxes required by the lease, and performed the various other covenants. Appellant accepted the rents and the building, and had the benefit of appellee's part performance. Appellant is thereby precluded from relying upon the non-performance of the residue of appellee's covenants, as a condition precedent to his liability. In the few particulars, in which appellee has fallen short of a full performance, compensation could have been made in damages. Such damages would have been the cost of a Portland cement floor in the basement, and the cost of lathing and plastering the walls thereof. But appellant introduced no evidence to show what damages, if any, he suffered by reason of the alleged failure to comply with these conditions of the lease. In the absence of such evidence, the trial court could make no allowance for such damages, and did not err in not making such allowance.

Something has been said in the arguments of counsel in regard to building contracts, where the principle of substantial, and not exact performance, is applicable. If the lease in question should be considered from this standpoint it certainly cannot be contended that the building, erected by appellee, was not a good and substantial building of the general plan described in the lease. In contracts called "building contract," a literal compliance with the specifications is not necessary to a recovery by the contractor. A substantial performance in good faith is sufficient. He will not be held to have forfeited his right to compensation by reason of mere technical, inadvertent or unimportant omissions or defects. Slight defects, caused by inadvertence or unintentional omissions, are not necessarily in the way of recovery of the contract price, less the amount by way of damages requisite to indemnify the owner for the expense of conforming the work to that for which he contracted. (Keeler v. Herr, 157 Ill. 57; Leeds v. Little, 42 Minn. 414.)

CHAPTER XIV.

DISCHARGE OF RIGHT OF ACTION.

UPON every breach of a contract the injured party acquires a right of action for compensation.

The compensation at common law is always pecuniary damages.

In certain classes of contracts where the remedy at law would furnish an inadequate compensation, a court of equity will take jurisdiction and decree a specific performance of the contract.

But inasmuch as pecuniary damages and specific performance depend upon, and to a large extent vary with the nature of the contract which has been broken, they hardly belong to the subject of contracts in general, and can be more profitably considered in immediate connection with the particular kinds of contracts.

We shall, therefore, leave the subject of contracts in general after giving some cases relating to the discharge of the right of action arising from breach of contract.

§ 100.—The right of action arising from a breach of contract may be discharged by
A release;
An accord and satisfaction;
The judgment of a court of competent jurisdiction;
Lapse of time.

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§ 101.—Release.

MILLS ET AL. v. LARRANCE.

1900. 186 Ill. 635, 58 N. E. 219.

IN this case a release and stipulation under seal, executed between the complainant and defendants after the suit was begun, were set up by cross-bill. Demurrer to the cross-bill was sustained and the cross-bill was dismissed.

CARTER, J.— * * * It is insisted by counsel for appellee that the cross-bill was defective in not alleging any consideration for the making of the stipulation by her. * * * But the stipulation re-

cites, and shows on its face, that it was entered into by the complainant, Nancy Larrance, and the defendants, Richard Mills and John Ashby, the only parties to the suit, and was under seal; and the rule is, that where the contract is under seal the seal imports a consideration, and it need not be averred in the declaration that there was a consideration for the contract. (1 Shinn's Pl. & Pr., § 516; 6 Am. & Eng. Ency. Law (2d ed.) 762.) We know of no rule or reason why greater strictness in equity pleading should be required than in pleadings at common law. The seal is presumptive evidence of a sufficient consideration to support the contract of settlement. (73 N. W. 29.)

Appellee cites 1 Pomeroy's Equity Jurisprudence (§§ 383, 371) as supporting her contention that in equity there must be an actual consideration for the contract, which must be alleged and proved. We do not so understand the citation referred to. True, the author says: "Equity, disregarding such forms and looking at the reality, always requires an actual consideration and permits the want of it to be shown notwithstanding the seal, and applies this doctrine to covenants, settlements and executory agreements of every description." Undoubtedly, in the case at bar the complainant might have answered and shown by proof, if such was the fact that there was no consideration for the agreement; but it does not follow that the agreement was not sufficient on its face without any proof being made, in the first instance, by the party relying upon it that there was a sufficient consideration to sustain it. If, on the hearing of the issue on the cross-bill, the cross-complainants might give in evidence the agreement without proof of a consideration, then no allegation of consideration in the cross-bill would be necessary. That which is not necessary to be proved is not necessary to be alleged. In Jackson, etc., Railway and Navigation Co. v. Hooper, 160 U. S. 514, it was held that a declaration in covenant setting out the sealed instrument, which showed that the instrument was under seal, sufficiently alleged that the instrument was under the seal of the company; and we do not understand in the case at bar that counsel claim that the cross-bill was insufficient because it did not in its allegations, aside from the instrument itself, allege that it was under seal, but the point insisted upon is, that, notwithstanding the instrument set up was executed and sealed by the parties and so alleged, good pleading in equity requires that a sufficient consideration should also have been alleged. We do not so understand the rule. Undoubtedly, in equity the seal would be no bar to an inquiry by the court, nor to an issue between the parties, as to the consideration, but if the defendant to the cross-bill desired such an inquiry or issue she should have set the matter up in her answer.

We are of the opinion that the cross-bill was sufficient on its face, and that the court erred in sustaining the demurrer and in dismissing it.

BINGHAM v. BROWNING.

1902. 197 Ill. 122, 64 N. E. 317.

IN this case there was a dispute as to whether $2,000 should be credited on the purchase price of a share in a firm ($75,000, of which $10,000 was paid in cash at the time of the purchase). The defense was based upon the following receipt.

"CHICAGO, December 31, 1898.

"Received of Henry W. King & Co., and of William C. Browning, individually, the sum of ($64,585.35) sixty four thousand five hundred and eighty five and 35-100 dollars, being in full payment of all claims of any name or nature against the said firm of Henry W. King & Co. and Browning, King & Co., and William C. Browning, individually. JAMES A. BINGHAM."

Trial by court without a jury. Judgment for defendant. Appeal.

RICKS, J.— * * * With reference to the payment appellant admits the receipt of the money and the giving of the release but insists that in law that does not constitute a bar to his action, because, he contends, the amount due him was liquidated, and that the receipt of a lesser sum than the whole of a liquidated debt does not satisfy the debt or release the debtor. Appellee, on the other hand, insists that there was a controversy over the amount due appellant; that while the original contract was for $75,000 ($10,000 of which was paid in cash at the time of making it), appellant, against the spirit and letter of the contract, withdrew $2,000 from the firm of Browning, King & Co. between the first and seventh of July, 1898; that the contract read as of July 1 and took effect on that day, and that any moneys drawn after that time by appellant were not included within the terms of the contract, and that appellee having succeeded to the assets of Browning, King & Co. he was entitled to a deduction of the $2,000 thus improperly withdrawn by appellant. * * * The mere fact that the original contract was in writing is not conclusive of the question that the damages or demand was a liquidated demand. Practically all written obligations for the payment of money are for a specific sum or a sum that can be made specific by mere calculation, but when it comes to a demand of payment or adjustment of the debt, the obligor or payor may insist that he has paid more upon the debt than the holder has given him credit for, or is entitled to off-set or counter-demands, in any of which cases it could not be contended that because a specific sum was stated in the writing of one of the parties the claim was a liquidated one, and that any settlement between the parties, however fairly and understandingly made, by which a less sum was paid by the obligor in the writing than it called for, would not be a bar to the action of the holder of the writing, on the ground that the whole sum called

for had not been paid. And in this case the question to be determined is not whether appellant might have recovered the full $65,000, and interest, from appellee upon the contract, but whether there was an honest dispute as to whether appellee was bound to pay the indebtedness of appellant to Henry W. King & Co. for moneys withdrawn between the first and seventh of July.

Upon a reading of the record we cannot escape the conclusion that there was an actual *bona fide* dispute between the parties as to the amount due appellant from appellee, and where there is a controversy and the balance due is fairly in dispute the claim cannot be treated as liquidated. "In such cases," said Brockes, J., in Farmers' Bank of Amsterdam v. Blair, 44 Barb. (N. Y.) 652, "it is not admissible to go behind the settlement with a view to determine which of the parties was right. Compromises are to be encouraged because they promote peace, and when there is no fraud and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise but will hold the parties concluded by the settlement." And this court said in Lapp v. Smith, 183 Ill. 179, quoting from McDaniels v. Bank, 29 Vt. 230: "When a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated and he attaches to his offer the condition that the same, if taken at all, must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction." Ostrander v. Scott, 161 Ill. 339; Hayes v. Massachusetts Mutual Life Ins. Co., 125 *id.* 626. * * *

Judgment affirmed.

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§ 102.—Accord and Satisfaction.

SIMMONS v. CLARK.

1870. 56 Ill. 96.

CLARK a judgment creditor and his debtor Simmons entered into a written agreement, by which the latter was to pay the former $500 in six months, and to give his promissory note for $3,500 payable in two years, and the note was given accordingly. The contract provided that when the debtor "shall have paid the said sums of money, with interest the same are to be in full settlement of the judgment," which was for over $8,000; and the creditor "further agrees and binds himself to release said judgment upon payment of the sum mentioned in said promissory note by the "maker thereof."

SHELDON, J.— * * * It is evident that the agreement, and note therein mentioned, which was given, were not taken in satisfaction

and extinction of the judgment. The agreement provides, that, when Simmons shall have paid said sums of money, with interest, the same are to be in full settlement of the judgment. Clark agrees to give a stay of execution for two years upon the judgment, and further agrees to release the judgment upon payment of the note. It was only payment of the money which was to satisfy the judgment, and not the promise of payment.

Nor can we accede to the view which is urged, that the agreement was a present release of all of the judgment beyond the $4,000. To have that operation, there must be express words or an unequivocal intention to that effect; but all the language and intent of the agreement, in respect to the release, are, that it is to take place in the future, upon payment of the moneys named, and to be then a release of the judgment, not a part of it.

This is the case, then, of a promise without execution; and without an express agreement that the promise itself should be a satisfaction; in such case there is no satisfaction of the original debt. The distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance. Cumber v. Wane, Smith's Lead. Cas. 146. A mere agreement, unexecuted, to accept a smaller sum in discharge of a larger, is not valid, and the giving of a negotiable promissory note of the debtor, for the smaller sum, on account of, and not in satisfaction of the prior debt, will make no difference. *Id.* 259, top paging, and see cases there cited.

Where an accord is relied on, it must be executed; readiness to perform is not sufficient, nor is part performance sufficient; an accord is always to be entirely executed and not executory in any part. 2 Parsons on Cont. 193; Russell v. Lytle, 6 Wend. (N. Y.) 390; Hawley v. Foote, 19 *id.* 516.

Here, this judgment of $8,253.94 was to be satisfied upon the payment of $4,000 within two years from April 16, 1866; payment, and not the promise of payment, was to be received in satisfaction; the two years have elapsed and the appellant has only paid $1,250. He has not performed, and there is no satisfaction of the judgment. * * *

LAUGHEAD v. FRICK COKE CO.

1904. 209 Pa. St. 368, 58 Atl. 685.

THE plaintiff, holding a claim against defendant, accepted $500 in cash and an agreement for employment in another company when a certain contingency should arise, and gave a receipt in full.

THOMPSON, J.— * * * The proofs show that he agreed to

settle his claim against the appellee for the sum of $500, and the promise of the position indicated by the Union Supply Company—the employment to commence when a vacancy in the position should occur, but that such vacancy was to be dependent upon a settlement of matters growing out of certain mining rights in which the then occupant was interested. It does not appear that the contingency upon which such vacancy was to arise has yet occurred. Appellant accepted the promise, and received the $500 in question, and, having received the same, he receipted in full for services. The accord and satisfaction thereby became complete, and the appellant cannot recover upon his original contract.

In Hosler v. Hursh, 151 Pa. St. 415, 25 Atl. 52, Mr. Justice Sterrett says: "It is, no doubt, true, as was held in Babcock v. Hawkins, 23 Vt. 561, cited by the learned president of the common pleas, that where the accord is founded upon a new consideration, and is accepted as satisfaction, it operates as such, and bars the remedy on the old contract. There is an obvious distinction between an engagement to accept a promise in satisfaction, and an agreement requiring performance of the promise. If the promise itself, and not its performance, is accepted in satisfaction, this is a good accord and satisfaction without performance." In the case referred to (Babcock v. Hawkins, 23 Vt. 561) it is said: "The accord is sufficiently executed when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of the former securities, by release or receipt in full, or in any other mode. All that is requisite is that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the pre-existing liability, in the present tense."

The receipt in the present case was in full, and was a receipt for unliquidated damages upon a disputed claim, and, as such, became final and conclusive, because not successfully impeached upon the ground of fraud, accident, or mistake. If, standing alone, unimpeached, it became a bar to appellant's recovery, it certainly cannot cease to be so operative because in addition thereto, and in connection therewith, he accepted from another company, distinct from appellee, a promise of a certain position in that company's employment. In the case of Flynn v. Hurlock, 194 Pa. St. 462, 45 Atl. 312, it is held: "Where a receipt is given 'in full of all demands' because the debtor refused to pay any more money without it, the creditor must be assumed to have received the money upon the express condition that it was in full of all demands, and he is concluded by it, notwithstanding his assertion at the time, that he 'waived no rights.'" * * *

HARD v. BURTON ET AL.

1890. 62 Vt. 314, 20 Atl. 269.

PLAINTIFF, having an account against defendants jointly, at their request agreed to charge certain of the items to one of the defendants, who assured plaintiff that he would pay the same, and the other defendant then paid the other items by giving his check and note therefor. The items which plaintiff agreed to charge to the first defendant were not paid.

ROWELL, J.— * * * The agreement relied upon to discharge the defendant O. A. Burton has not been performed by the other defendant, nor does it appear that the plaintiff agreed to accept the latter's "assurance" of performance in discharge of the former. The rule is that if the new promise itself be the thing accepted in discharge it will be operative accordingly, but that if the "performance" of it and not the promise itself be the thing accepted, there will be no discharge without performance. Cumber v. Wane, 1 Smith Lead. Cas. 444, 447; Kromer v. Heim, 75 N. Y. 574; Morehouse v. Bank, 98 N. Y. 503; City of Memphis v. Brown, 20 Wall. (U. S.) 289, 308. And see this rule well stated in Prof. Benjamin's Principles of Contract 368 *et seq.* An accord is sufficiently executed when all is done that the party agreed to accept in satisfaction; but what he did agree to accept should be shown by an agreement or some unequivocal act. It is enough if the new promise is executed to the point at which it was intended to operate in discharge of the others, but such execution must appear. Babcock v. Hawkins, 23 Vt. 561; Stults v. Newhall, 118 Mass. 98. * * * The plaintiff "agreed" to charge to D. Noyes Burton, who "assured" plaintiff he would pay. This is not a finding that the plaintiff agreed to accept said assurance in discharge. Thus, in Flocton v. Hall, 14 Q. B. 380, 16 Q. B. 1039, a plea in bar of further maintaining the action alleged that "it was agreed" that certain things named should be done, and the action and the causes of action included therein, "settled, satisfied, discharged, and terminated by the arrangement and agreement aforesaid;" and the plea was held ill for not alleging that the agreement was accepted in satisfaction. Thompson v. Percival, 5 Barn. & Adol. 925, was sent back for an express finding on this point. In Lyth v. Ault, 7 Exch. 669, the plea expressly alleged an acceptance of the defendant Wood alone as plaintiff's debtor instead of the defendant's jointly, and a discharge of the defendant Ault. In Parker v. Cousins, 2 Gratt. (Va.) 372, it is said to be safe to affirm on principle and authority that an unperformed like promise made to the same party by one of two already bound for the same debt will not discharge the other debtor unless the parties making and accepting the new promise intended or stipulated that such discharge should be the consequence of the making and accepting of the new several

promise. Nor will the law presume in such case that the creditor agreed to accept the new contract in discharge of the old, but the party alleging that must prove it. Woodward v. Miles, 4 Fost. (N. H.) 289. * * *

BROOKS ET AL. v. WHITE.

1841. 2 Met. (Mass.) 283.

DEWEY, J.—The plaintiffs contend that the evidence, offered to sustain the defense of an accord and satisfaction of the note upon which this action is instituted, cannot avail the defendant, because by his own showing it was only the payment and acceptance of a less sum than the amount due on the note. The general principle, that the acceptance of a less sum in money than is actually due cannot be a satisfaction and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon such condition, seems to be recognized in books of unquestionable authority. The reason of the rule is, as stated by Lord Ellenborough, in Fitch v. Sutton, 5 East 232, that there must be some consideration for the relinquishment of the excess due beyond the sum paid; something to show a possibility of benefit to the party thus relinquishing a legal right; otherwise the agreement is *nudum pactum*. So in Pinnel's Case, 5 Co. 117, where it was resolved that payment of a less sum on the day, in satisfaction of the greater, cannot be a satisfaction of the whole, because it appears to the judges that by no possibility a less sum of money can be a satisfaction to the plaintiff for a greater sum. But the gift of a horse or the like, in satisfaction, is good; for it shall be intended that the horse might be more beneficial to the party than the money, or he would not have accepted it in satisfaction.

The foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import, and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due. Thus, where any other articles than money are received and agreed to be accepted in full satisfaction of a debt, the

court will not estimate their value in money's worth, but hold the consideration to be good, and the promise to discharge the entire debt a valid contract. This distinction was recognized in the resolutions in Pinnel's case, already cited. In Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, the receiving of a note of hand for a less sum than was due, with the name of another person as promisor or indorser, where the creditor agreed to accept the same as a satisfaction of the whole debt, was held a valid discharge, as an accord and satisfaction. In that case, the court say, "here was a beneficial interest acquired, and a valuable consideration received by the plaintiffs, when they agreed to accept less than their whole demand." The same rule was adopted in Kellogg v. Richards, 14 Wend. (N. Y.) 116, where it was held that if a creditor, on a compromise with his debtor, accept the note of a third person for a less sum than the debt due to him, in full payment of such debt, the acceptance of such note may be pleaded as an accord and satisfaction in bar of an action to recover the balance due beyond the amount thus received. Nelson, J., says, "it is true there does not seem to be much if any ground of distinction between such a case and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. But the distinction is as sound as that which exists between the cases of receiving a less sum of money, and an article of property just half the value of the sum due, which would constitute a perfect defense. The rule, that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore have departed from it on slight distinctions."

But there is another principle, which the facts in the present case authorize us to apply, which is equally fatal to the maintenance of the technical objection relied on by the plaintiffs. The same ancient authority which declares that the payment and acceptance of a less sum, on the day the debt becomes due, in satisfaction of a greater, is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum, before the day of payment has arrived, in satisfaction of the whole, would be a good accord and satisfaction; for it is said, peradventure parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material. Pinnel's Case, 5 Co. 117. And the same doctrine is found in Co. Lit. 212b, where it is said, "if the obligor pay a lesser sum, either before the day, or at another place than is limited by the condition, and the obligee receiveth it, this is a good satisfaction." Yelv. (Am. ed.) 11a, note. The transfer of the notes by Downing was therefore a sufficient consideration for a promise by the plaintiffs to receive them in full discharge of the note. * * *

SELTZER v. COLEMAN.

1859. 32 Pa. St. 493.

READ, J.—The law on this subject is correctly laid down by Judge Story, in his commentaries on the Law of Promissory Notes, § 437: "A negotiable promissory note," says Judge Story, "will, by our law, operate as an extinguishment of a prior existing debt, if it is so intended between the parties. The only question is, as to the proof of such an intention. In general, as we have already seen, by the law of England, and most of the states of America, the receipt of a promissory note of the debtor, for a debt, is, in the absence of all other proof, treated as a conditional payment only of the debt; that is to say, if, or when, the note is paid. But if the note is intentionally received as absolute payment, the original debt becomes thereby extinguished." See Chitty on Bills, 10th ed., 1859, p. 119; Smith's Mercantile Law, 6th ed., 1859, p. 542.

It is, therefore, a question of intention; which is a question of fact for the jury, upon the evidence.

The affidavit of defense in this case, was filed in a *scire facias* on a mechanic's claim, which it alleged had been fully paid and satisfied, as would appear by the statement and receipt signed by the plaintiff, which is given at length in the paper-book. The mechanic's claim was filed on the 2d of August, 1858, and the statement and receipt is a bill dated 11th of February, 1858, made out by the plaintiff in the usual form, in which the defendant is made debtor to the plaintiff,

"February 6.	To marble work, as per contract of house, corner of Tenth and Fitzwater streets..	$700 00
	To bill rendered for extras.....	120 50
		$820 50
	By cash	200 00
		$620 50
	Interest for three months on note.....	9 00
		$629 50
	Credit by note dated January 25th.....	609 00
		$20 50"

at the foot of which bill is the following receipt:

"Received May 1st, 1858, from C. A. Seltzer, twenty dollars and fifty cents, the above balance due me on this bill, in full of all demands up to this date.

"$20.50. JOHN T. COLEMAN."

It does not appear by the bill, whose note it was, nor when it was payable; and no verbal explanation of counsel, in a court of error, can add to or take from the paper, which is to be read according to its own words alone. It is, therefore, not the simple receipt of a promissory note for a precedent debt, but it is accompanied by language tending to show that it was taken in satisfaction and discharge; and if that was the intention of the parties, then the lien was extinguished.

We are not without direct authority in this state. In Jones v. Shawhan, 4 W. & S. 257, it was decided, that a receipt given for a note "in full of the bill," was evidence to rebut the presumption that it was not payment or satisfaction, and should be left to the jury. This case has remained undisputed up to this time, and it would be impossible for one, not a lawyer, to distinguish it from the present one.

This receipt "in full of all demands up to this date," would clearly convey the idea to a purchaser of the property, that the mechanic's lien was satisfied, or extinguished, or given up; and if so, then the case should have been submitted to a jury.

Judgment reversed, and *procedendo* awarded.

LAPP ET AL. V. SMITH ET AL.

1899. 183 Ill. 179, 55 N. E. 717.

BOGGS, J.—Though the items of appellees' claim were not disputed, yet a set-off was asserted, and that the demand had become and was a matured liability was denied. The amount of the appellee's claim being in dispute and that it was due being denied, it was an unliquidated demand. (Ostrander v. Scott, 161 Ill. 339.) The letter written by appellants was an offer to adjust the differences between the parties by the substitution of the check and the three notes for the appellees' claim or demand and in satisfaction thereof. It was so understood by appellees, who replied that such an arrangement was not satisfactory to them. The offer was indivisible, covered the whole claim, was clearly to be accepted as an entirety in satisfaction of the whole claim or rejected as a whole. If accepted it would constitute a bar to a right of action on the demand. (1 Beach on Contracts, §§ 441, 442; White v. Jones, 38 Ill. 159; Rayburn v. Day, 27 *id.* 46.) The check was not tendered as a payment upon the original claim, but it and the notes were offered together for acceptance, as in compliance with a proposed new undertaking and agreement then submitted for acceptance in discharge of the unliquidated and disputed claim. The appellees were called upon to

accept the proposition as an entirety as made, or reject it *in toto.* Ostrander v. Scott, *supra;* 1 Beach on Contracts, §§ 51, 52; McDaniels v. Bank, 29 Vt. 230; Fuller v. Kemp, 138 N. Y. 238.

The position of appellees is, that they rejected the proposal and the right of action on their demand remained unimpaired, the appellants being entitled to elect whether they would institute appropriate action to recover the check, or the amount thereof, or demand a credit therefor on the original claim. This view seems to have been accepted by the trial court, and erroneously so, as we think. The check was tendered on condition it, and the notes which accompanied it, should be accepted in satisfaction of the unliquidated disputed claim. The acceptance and retention of the check involved the acceptance of the condition upon which it was offered, and the law will not permit the appellees to escape that conclusion so long as they retain the check. Ostrander v. Scott, *supra,* exemplifies this doctrine. In that case appellants enclosed by mail to appellees a check, and in an accompanying letter advised them the check was tendered in settlement of the account in full and should be so accepted or returned. Appellees (in that case) replied that they retained the check as a payment in the amount thereof, and demanded remittance of the balance of such account. The doctrine of the case is that the legal effect of the act of retaining the check was an acceptance of the same on the conditions upon which it was tendered. In Fuller v. Kemp, 138 N. Y. 238, which involved the same principle, it was said: "The tender and the condition could not be dissevered. The one could not be taken and the other rejected. The acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference to be drawn from the transaction. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of this act." And in McDaniels v. Bank, 29 Vt. 230, the court said: "When a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and he attaches to his offer the condition that the same, if taken at all, must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction. * * * The mere act of receiving the money is an agreement to accept the same on the conditions upon which it was offered." The doctrine of these cases is applicable here. The instructions asked the court to declare it to the jury, and we think the court erred in refusing to do so.

The judgment of the branch appellate court and that of the superior court are reversed and the cause remanded.

Reversed and remanded.

§ 103.—Judgment of a Court.

WEBB v. BUCKELOW.

1880. 82 N. Y. 555.

FINCH, J.— * * * A judgment when pleaded is a bar, and as evidence is conclusive, between parties and privies, upon the principle that there should be an end to every litigation, and when an issue has been once actually determined, it should not again be contested by the same adversaries, or those claiming under them. Greenl. Ev., § 522; Marsh v. Pier, 4 Rawle (Pa.) 273, 288, 26 Am. Dec. 131; Cow & Hill Notes, 21, note 262. The general rule is intended to prevent litigation and preserve peace; and were it otherwise men would never know when they might repose with security on the decisions of courts of justice; and judgments solemnly and deliberately given might cease to be revered as no longer the end of controversy and evidence of right. Le Guen v. Gouverneur, 1 Johns. Cas. 501, 502, 1 Am. Dec. 121. But without such actual determination on the merits, evidenced by a record which cannot be contradicted, the reason of the rule does not apply, and the evidence ceases to be effective. Thus where the litigation has ended in a discontinuance or a non-suit, so that an actual decision on the merits has not been reached; or where a verdict of a jury, or the finding of a judge or referee has not passed into a judgment, and so become absolutely fixed and final, the proceedings have no conclusive character, and cannot operate as a bar. Carlisle v. McCall, 1 Hilt. (N. Y.) 399; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Leonard v. Barker, 5 Denio (N. Y.) 220. It is therefore only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with verity as a record, settles finally and conclusively the questions at issue. An interlocutory order is not such a judgment. It is not a judgment at all. Code Proc., § 245; Belmont v. Ponvert, 3 Robt. 693. And if as an order it partakes, in equity cases, of the character of what was long known as an interlocutory decree, yet whenever it is not final; whenever it fails to fix and determine the ultimate rights of the parties; wherever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing. Until the judgment comes, no man can know what the ultimate decision will be. * * *

TREMBLAY v. ÆTNA LIFE INS. CO.

1903. 97 Me. 547, 55 Atl. 509.

SPEAR, J.—* * * There is still another reason why the proceedings at Quebec are not *res judicata*. "No court can rightfully render judgment in a cause until it has acquired complete jurisdiction over the parties, the subject matter of the suit, and the process." Penobscot R. R. Co. v. Weeks, 52 Me. 458. "But the records of all courts are liable to be impeached, if it can be done by inspection alone; and if such inspection discloses want of jurisdiction over the person of the defendant, the judgment will be void against him for that purpose." *Id.*, p. 459. "If the record negative the jurisdiction, or if it had not been extended, and the original papers do so, then the supposed judgment is void." Tourigny v. Houle, 88 Me. 408, 34 Atl. 159. "Where it appears by the record itself that there was no appearance, and no notice which he was bound to attend to, the judgment against him is a dead letter beyond the territory in which it was pronounced." Middlesex Bank v. Butman, 29 Me. 25. Under these decisions, the plaintiff in the present case is not bound by the proceedings in Quebec. No legal service of the writ was made upon him. He was a resident of a foreign country, and the plaintiff knew his residence, and alleged it in his writ to be in Lewiston, Me., U. S. A. Service of the writ was by publication. The writ, declaration, summons, publication, default, and judgment were against the heirs of Jean O. Tremblay, defendants, giving no name or names. Such a writ and such service would not give our courts jurisdiction upon which a valid judgment could be rendered *in personam*. * * *

BARNES & DRAKE v. GIBBS ET AL.

1865. 31 N. J. L. 317.

BEASLEY, C. J.—The principal question upon which this court is asked in this case for its advisory opinion is, whether the judgment rendered by the supreme court of New York occasions a merger of the original cause of action.

Mr. Justice Elmer, in the case of Moulin v. Insurance Company, 4 Zab. (N. J.) 230, remarks that "in Mills v. Duryee, 7 Cranch (U. S.) 481, a majority of the judges seem to have understood that a judgment of a superior court of one of the states, when an action was brought upon it in another state, would be in all respects of the same effect as a judgment of a court in the state where the action was brought." That such will be the effect of a judgment rendered by a

court having jurisdiction in the premises, conferred by legislative authority upon principles consistent with international law, cannot now be considered an open question. Indeed, so completely does the discussion of this doctrine appear to me to be exhausted, and the doctrine itself to be so authoritatively established, that I do not deem it necessary to refer to the decisions pertaining to the topic, much less to review the ground on which these decisions rest. It is fit, however, to remark that besides the expression of judicial opinion in this state above referred to, a similar view of this subject was evidently entertained by Chief Justice Ewing and the present chancellor. Gulick v. Loder, 1 Green (N. J.) 70; Gilman v. Lewis, 4 Zab. (N. J.) 246.

If, then, the judgment of a state court, having a jurisdiction legitimately conferred upon it, has, in another state, the same effect, in all respects, which it would possess in the state in which the action was brought, it seems necessarily to result, that in the absence of all allegation of the existence of a different rule of law in the state where the judgment was rendered, the inference must be that the original cause of action is merged. The effect of a judgment at common law is practically to destroy, so long as it exists, the ground upon which it rests. This is one of its essential qualities, as much as is its capacity to conclude with regard to the fact which it adjudges. To deny it this efficacy, is to deny that it is a judgment in any sense which will accord with legal principles. And in fact the doctrine of merger arises out of the quality of a judgment, which renders it conclusive upon the parties as to the questions which it involves. Theoretically, the original matter, which was open to controversy, is considered merged, because it is definitely settled by the judgment. Regarding, then, the judgment of the extra territorial court as final, it is a necessary consequence to regard the original cause of action as merged, because if the plaintiff sue on the original cause of action, it is treating it, although judicially settled, as open to controversy. In addition to this, it may be remarked, that the opposite doctrine would introduce confusion and uncertainty in the practical application of the principles of law which belong to the subject. To hold that the judgments rendered in other states are not, with regard to their effect, complete common law judgments, would be to place the subject in an indefinite and mutilated condition. For if such judgment will not merge the original cause of action, who can tell what qualities are possessed by it?

Nor does there seem to be much weight in the argument, *ab inconvenienti*, which was pressed upon the attention of the court. It is true that meritorious creditors might sometimes find it to their advantage, to pursue their debtors with simultaneous suits in two or more states. But even in such cases it cannot escape observation, that the course suggested as beneficial to the creditor savors something of harshness, if not oppression to the debtor. Practically, he

is vexed twice or oftener for the same cause. And on the other hand, when the claim sued on is unfounded and a just defense exists, the right to institute co-existent suits in different jurisdictions, founded in the same subject, becomes an instrument of oppression, which it would be, by no means, prudent to place within the reach of rapacity or vindictiveness. The maxims of common justice seem to require, that the judgment should be considered as conclusive, both in favor of as well as against the debtor. But on this topic, also, I think the adjudications already rendered have occupied the entire field of discussion. Andrews v. Montgomery, 19 Johns. (N. Y.) 162; Bexley v. Linah, 4 Harris 241; Green v. Sarmiento, 3 Wash. C. C. R. 17; Bank of U. S. v. Merchants' Bank, 7 Gill (Md.) 415; Bank of North Am. v. Wheeler, 28 Conn. 433. * * *

BACON ET AL. v. SCHEPFLIN ET AL.

1900. 185 Ill. 122, 56 N. E. 1123.

MAGRUDER, J.— * * * It is said by counsel for appellants that evidence of the non-maturity of the debt sued upon should not be admitted under the general issue, upon the alleged ground that the judgment based thereon would bar a later suit brought on the claim when due. The answer to this contention is, that "a judgment against a party because the action was prematurely brought, * * * is no bar to a suit subsequently brought, after the cause of action properly accrued." (Brackett v. People, 115 Ill. 29, 1 Freeman on Judgments, §§ 268, 269.) A final judgment, where a plea in bar has been filed, is conclusive as to the cause of action involved and existing at the time of bringing suit; but it is a well settled principle in relation to the subject of *res judicata*, that a former adjudication never affects after acquired rights. Rights, which had not accrued to either party at the time when the judgment is rendered, cannot be prejudiced thereby. Rights, which did not exist at the time of the rendition of the judgment, could not have been then passed upon, and, if they did not exist at the time of the former judgment, the causes of action in the two suits could not be similar. (State of Wisconsin v. Torinus, 26 Minn. 1; Wood v. Faut, 55 Mich. 185; Palmer v. Temple, 9 Ad. & El. 508; Drake v. Vorse, 42 Iowa 653.) The issues involved in the first suit, which is set up as a bar to the second suit, may, when necessary, be shown by parol, and where the evidence shows the issue in the first suit to have been that the action was prematurely brought, the former judgment forms no obstacle to the recovery when the debt is sued upon after maturity. An action, brought for the price of goods before credit has expired,

will not prevent a recovery of the same goods after that period. * * *

WILBUR v. GILMORE.

1838. 21 Pick. (Mass.) 250.

MORTON, J.— * * * The former judgment was rendered on a general demurrer to the declaration, and is no bar to this action.

The general rule undoubtedly is, that the judgment in one action shall bar all other suits between the same parties and for the same cause of action. *Interest reipublicae ut sit finis litum.* But this rule is limited to judgments rendered on the merits. If the plaintiff be non-suit for want of proof, or because his *allegata* and *probata* do not agree, or for any other cause, he may commence another action. 1 Chitty on Pl. (5th ed.) 227; Gould on Pl. 478. Even a judgment of non-suit on the merits, or on an agreed statement of facts, has been holden to be no bar to another action. Knox v. Waldoborough, 5 Greenl. (Me.) 185; Bridge et al. v. Sumner, 1 Pick. (Mass.) 371. So if the plaintiff mistake the form of his action, as if he bring trespass instead of trover, and his writ be adjudged bad on demurrer, the judgment will not bar an action of trover. 1 Chit. Pl. (5th ed) 227; Gould on Pl. 478, § 46. So if the plaintiff mistake his cause of action and the defendant demur and have judgment, this will not preclude the plaintiff from commencing a fresh action, correctly setting forth the right cause. So also if the declaration be demurred to, or a bad plea be pleaded and demurred to, and a judgment be rendered against the plaintiff for the insufficiency of his declaration, it will not estop the plaintiff from bringing another action to enforce the same right; because the case as stated in the last declaration was not tried in the first. In all these cases, if the defendant plead the former judgment in bar, the plaintiff may reply that it was not obtained on the merits. 1 Chit. Pl. (5th ed.) 227; Gould on Pl. 478, § 45; Vin. Abr. Judgment (Q. 4); Lampen v. Kedgewin, 1 Mod. 207. In this last case, North, C. J., says, "there is no question but that if a man mistakes his declaration and the defendant demurs, the plaintiff may set it right in a second action."

It is apparent from the record, that the former judgment between these parties, was rendered upon the insufficiency of the declaration and not upon the merits of the case, and therefore can be no bar to the present action.

MARSH v. PIER.

1833. 4 Rawle (Pa.) 273.

KENNEDY, J.—* * * Where a subject or question in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed. The peace of the community is a great *desideratum*, and nothing ought to be tolerated, that would disturb it unnecessarily. Before the rendition of a judgment, the court is presumed to be made acquainted by one or the other, or by both of the parties, with everything that is necessary to be known, in order to procure a correct decision upon the case; so that the judgment of the court not being pronounced until after it has been so informed, must be taken and considered as corresponding and answering fully to the claims of justice. It is therefore altogether inadmissible to say, that a renewal of the contest shall or ought to be permitted, because the first decision was not just or right. * * * The maxim, *nemo debet bis vexari, si constet curiae quod sit pro una et eadam causa,* being considered, as doubtless it was, established for the protection and benefit of the party, he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow, that wherever on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, that it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *expedit reipublicae ut sit finis litium,* which is as old as the law itself, and a part of it, will be exploded and entirely disregarded.

But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors, to the preservation of the public tranquility and happiness. The result, among other things, would be, that the tribunals of the state, would be bound to give their time and attention to the trial of new actions, for the same causes,

tried once or oftener, in former actions between the same parties or privies, without any limitation, other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally of other causes, which never have passed *in rem judicatam.* The effect of a judgment of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, etc., which may, or may not be enforced at the election of the other party; because, whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed. * * *

McJILTON v. LOVE.

1851. 13 Ill. 486.

TREAT, C. J.— * * * The law is well settled, that if a judgment is reversed, the parties are to be restored to their original rights, so far as it can be done without prejudice to third persons. If the plaintiff has derived any benefit from the judgment, he must make as full restitution to the defendant, as the circumstances of the case will permit. If he has received payment in money from the defendant, the latter can recover it back in an action of *indebitatus assumpsit.* If he has obtained money by the sale of the property of the defendant, the latter may recover it as so much money had and received to his use. If he has purchased in property under the judgment, and still retains the ownership, the defendant may recover the specific property in the appropriate action. If he has aliened the property, he is responsible to the defendant for its value. But the rights of third persons are not affected. Their title to property acquired under an erroneous judgment is not divested by its reversal. In such cases, the defendant must look to the plaintiff for redress. These principles are too well established by authority to require further discussion. Bank of U. S. v. Bank of Washington, 6 Pet. (U. S.) 8; Clark v. Pinney, 6 Cowen (N. Y.) 297; Green v. Stone, 1 Harris & Johnson (Md.) 405; McLagan v. Brown, 11 Ill. 519; Steelman v. Cheeseman, Pennington (N. J.) 120; Hubnel v. Broadwell's Administrator, 8 Ohio 120. * * *

BOOTH v. FARMERS' AND MECHANICS' NAT. BANK.

1878. 74 N. Y. 228.

RAPALLO, J.— * * * Where one of several joint debtors pays the debt, his remedy against the others is confined to a claim for contribution, and where, as in the present case, the debt arises out of a partnership transaction, the amount, if any, to which the party paying is entitled as against the others necessarily depends upon the state of the partnership account. He cannot keep the paid claim, or any judgment thereon, alive and enforce it against the others, either in his own name or in that of any third party to whom he may cause it to be assigned, unless perhaps under special circumstances to the extent of the sum which may be found due to him from his co-partners on an accounting with them. *Prima facie,* at least, the debt and all judgments recovered thereon against the copartners are discharged by the payment of the debt by one of them. * * *

UNITED STATES v. DASHIEL ET AL.

1866. 3 Wal. (U. S.) 688.

CLIFFORD, J.— * * * Motion to dismiss is grounded solely upon the alleged fact that the judgment was satisfied before the writ of error was sued out and prosecuted. Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the court. Actual satisfaction beyond the amount specified in the return of the marshal cannot be pretended, but the theory is, that the levy of the execution in the manner stated affords conclusive evidence that the whole amount was paid, and it must be admitted that one or two of the decided cases referred to appear to give some countenance to this view of the law; that is, they assert the general doctrine that the levy of an execution on personal property sufficient to satisfy the execution operates *per se* as an extinguishment of the judgment. Mountney v. Andrews, Cro. Eliz. 237; Clerk v. Withers, 1 Salk. 322; Ladd v. Blunt, 4 Mass. 403; *Ex parte* Lawrence, 4 Cow. (N. Y.) 417. None of those cases, however, afforded any support to the theory that any such effect will flow from the issuing an execution and the levying of the same upon land. On the contrary, the rule is well settled that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already had by the lien of his judgment. Shepard v. Rowe, 14 Wend. (N. Y.) 260; Taylor v. Ranney, 4 Hill (N. Y.) 621. Reason given for

the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits. Reynolds v. Royers, 5 Ohio 174. Many qualifications also exist to the general rule as applied to the levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by numerous decided cases. Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. Green v. Burke, 23 Wend. (N. Y.) 501; Ostrander v. Walter, 2 Hill (N. Y.) 329; People v. Hopson, 1 Den. (N. Y.) 578. Rightly understood the presumption is only a *prima facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt, says Bronson, Ch. J., is gone, although the creditor may not have been paid. Under those circumstances, the creditor must take his remedy against the officer, and if there be no such remedy he must bear the loss. Taylor v. Ranney, 4 Hill (N. Y.) 621.

Tested by these rules, and in the light of these authorities, it is very clear that the theory of fact assumed in the motion cannot be sustained. Satisfaction of the judgment beyond the amount specified in the return of the marshal is not only proved, but the allegation is disproved by the amended record. * * *

LAPSE OF TIME.

§ 104.—In the several states there are statutes called Statutes of Limitation, which prescribe a limit of time for the commencement of an action, and when invoked afford an absolute bar to an action brought beyond the prescribed time: For Illinois, see Rev. St. Ill., ch. 83.

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QUESTIONS ON CONTRACT

Answers may be found at corresponding sections in either Benjamin's "Principles of Contract" or "Cases on Contract," edited by Benjamin and Messing.

QUESTIONS ON CONTRACT

THE FORMATION OF CONTRACT

Section 1.

What is an agreement in the legal sense?
What does an agreement necessarily imply?
Will a mere mental assent constitute an acceptance?
By what means can the concurrence or union of wills be ascertained?

Section 2.

What is a contract in the broad sense of the term?
What is a right *in rem*?
A right *in personam*?

Section 3.

What is a contract in the narrow and proper sense?
What is the obligation assumed by the other called?
Which kind of right does such a contract always confer and what is the corresponding duty?
What is a contract in the narrow and proper sense frequently called?
What are the elements essential to the validity and enforcement of a contract?

CHAPTER I.

OFFER AND ACCEPTANCE.

Section 4.

What intention must an offer manifest?
What if an offer evidently made in jest is accepted?

Section 5.

What is the rule as to the character of the acceptance?
What if an offer for the unexpired term of a lease is accepted conditional on the assent of the lessor, which is not obtained?

What if an acceptance is qualified as to place or terms of payment?

What if a term of an agreement is left for future consideration and adjustment?

What if parties come to an agreement with the understanding that it is to be put into a formal writing before it shall be considered as complete?

Where there is a reference to a further formal writing what is the question and from what is it mainly to be determined?

What is the effect of an acceptance on terms varying from those proposed?

What is the effect of a counter proposal?

Section 6.

When may an offer be revoked?

What if the offer purports to give a definite time for acceptance?

What if a promise to keep the offer open is founded on a valuable consideration?

What if a promise to convey land for a certain sum at the option of the lessee is made part of the lease in consideration of higher rent?

What if A agrees to sell to B and B agrees to buy of A all the goods of a certain kind needed or required in a certain business during a definite time at a specified price?

What if A agrees to sell B as much of a certain class of goods as B may desire or order and B does not promise to do anything?

Section 7.

In what different ways may an offer lapse before acceptance?

To what is a limitation of time for which an offer is to run equivalent?

What if a person makes an offer by mail requesting an answer by return mail?

Where no time for acceptance is mentioned what is a reasonable time?

What was held where an offer contained in a letter dispatched by wagon requested an answer by return of the wagon to a designated place?

What was held where A gave a note to the trustees of a church to enable them to procure a bell, but a bell was not purchased until after the death of A?

What was held where A signed a subscription paper for the payment of a given sum upon the condition that a certain sum should be subscribed for the erection of a church building, and A was adjudged insane before the church took any action upon the faith of this subscription?

Section 8.

Where the parties communicate by means beyond their control, as by letters sent by mail, when is the contract complete?

What if, in the meantime, the party who made the offer has mailed another letter withdrawing his offer?

What if the letter of acceptance is never received by him?

May he make the formation of the contract dependent upon the actual communication to himself of the acceptance?

What if a letter is delivered to a United States letter carrier while on his rounds?

May there be an acceptance by telegram?

What is necessary to establish a bilateral contract where the parties are at the same place, and no particular mode of acceptance is indicated?

Section 9.

What is the rule as to certainty of the terms of an agreement?

What was held where an intestate promised his niece that if she would live with him until her marriage he would give her "one hundred acres of land?"

What is the maxim as to certainty?

What was held where a lessee of land was given the right to purchase it "upon such terms and at the same price per acre as any other person or purchaser might have offered therefor?"

Section 10.

How may the offer or acceptance be expressed?

Where goods are sent in accordance with an order, which is the offer and which is the acceptance?

What if a party takes possession of goods without any dissent from the stated terms of sale?

What if a party, who had accepted the same kind of goods sent to him in the same way several times before, remains silent for an unreasonable time?

What if A with B's knowledge and silent acquiescence does work beneficial to B under such circumstances that no reasonable man would suppose that A meant to do the work for nothing?

What if it appears from the circumstances that the service was an act of friendly accommodation or rendered without expectation of payment?

What is a tacit as distinguished from an implied contract?

Section 11.

What is the effect of performance of the conditions of an offer?

Of acceptance of the consideration proffered with an offer?

If A tells B that he will pay him a certain sum of money for a day's work, by what acts may B accept?

Section 12.

To whom may an offer be made and when does it become a contract?

When does an offer, by way of advertisement of a reward for information leading to the restoration of property or the conviction of a criminal, addressed to the public at large become obligatory?

How may such offer of reward be revoked?

When does such an offer lapse?

Where several persons give the desired information who is entitled to the reward?

When can a public officer recover a reward?

What if the party had no notice of the offer at the time he rendered the service?

Where a merchant advertises or states to a correspondent the kind, quality or price of the goods he has for sale, how is a subsequent order for goods to be treated?

CHAPTER II.

CONSIDERATION.

Section 13.

In every contract containing a promise what must there be?

What if the contract is under seal or negotiable?

What is a mere *nudum pactum?*

When can a voluntary subscription to promote some lawful object of common interest be enforced?

What is a seal?

In Illinois and several of the states what has the same effect and obligation?

What is a contract under seal frequently called?

At common law what does a seal import?

In Illinois and most of the states may the want of a consideration be pleaded and proved where the contract is under seal?

Is a voluntary agreement under seal enforceable in courts of equity?

When is a contract said to be negotiable?

What does the form of a negotiable instrument import?

When may the want of a consideration of a negotiable instrument be shown?

Section 14.

When is there a sufficient consideration for a promise?

Why is motive not the same thing with consideration?

If A sells a horse to B for $100, and B gives in payment therefor a note for that amount drawn payable to C at A's request, and A delivers the note to C, can the latter enforce the note against the maker?

If A delivers money or property to B under a promise that he will deliver it to C can the latter maintain an action against B for a breach of the contract?

Is inconvenience or trouble on the part of the promisee a sufficient consideration where it is not of any benefit to the promisor?

What if there is the surrender of a legal right, e. g., the right to name a child?

What if an heir withdraws opposition to the probate of a will?

What if there is forbearance of a legal right, though actually beneficial to the promisee, as where abstinence from the use of intoxicating liquors or of tobacco is the consideration for the promise?

What if there is a promise for a promise?

Give an illustration.

What if the promises are made at different times?
By what must the benefit or detriment constituting the consideration be induced?
Is marriage a valuable consideration?

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What is the rule as to the value of the consideration?
Does the rule apply to a mere exchange of unequal sums of money?
How may inadequacy of consideration be regarded where there are circumstances tending to show fraud or undue influence?

Section 16.

What is the rule as to abandonment of a right or forbearance to exercise it?
What if no time for the forbearance is specified?

Section 17.

What is the rule as to compromise of a disputed claim?
What if the claim ultimately prove to be unfounded?
What is said of family compromises?

Section 18.

What is the rule as to the delivery of property to a person in trust?

Section 19.

What is the rule as to blood or natural affection?
Is a mere moral obligation sufficient to support a promise?
Give an illustration.

Section 20.

What is the rule as to a promise whose performance is impossible in itself?
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Give an illustration.
What is the rule as to a promise whose performance is impossible by law?
Give an illustration.

Section 21.

What is the rule as to a promise to do or actually doing what one is legally bound to do?
What if there is a promise to pay a judgment?
A promise to surrender valuable papers?
A promise to perform a public duty?
A promise to resume marital duties?
What if such promise is coupled with the giving up or refraining from justifiable proceedings for divorce?

When, if ever, will mere part payment of a claim support a promise to relinquish the residue or to forbear to sue for it?

What if there is the performance or undertaking of anything beyond or different from what one is already bound to do?

What if there is a promise to accept a less sum in satisfaction of a debt and a mortgage is given for such sum?

May a contract wholly or in part executory on both sides be rescinded by mutual consent?

Under what circumstances, if ever, will a new contract made by the parties be binding where the terms on one side are the same as in the old contract?

Section 22.

What, if any, part of an entire or indivisible consideration for one or more promises is illegal?

What if the consideration for a promise to an attorney consists of professional blended with lobby services?

Section 23.

What if any one or any part of any one of several considerations for a single promise is illegal?

What if one of several considerations is merely void or nugatory and not illegal?

Section 24.

What if two distinct promises, one legal and the other illegal, are made for a valid consideration?

What if there is a divisible promise, one part of which is legal and the other illegal?

Can the legal part of a divisible promise be enforced where the other is void because in unreasonable restraint of trade?

What if the promise is in the alternative, one branch legal and the other illegal?

What if goods are sold at a certain price for each article, and the sale of some of the articles is illegal?

Section 25 (A).

What is the rule as to a past consideration?

Give an illustration.

What if a past service was rendered with the promisor's consent, but without any intention of claiming a reward as of right?

What if services are rendered by one member to another of the same family without any expectation of remuneration?

Section 25 (B).

State the three supposed exceptions to the rule relating to past consideration?

When will services rendered upon request support a subsequent promise of recompense?

What if the circumstances show that the services were rendered as a mere favor?

Section 25 (C).

Where one without authority does that which another was legally bound to do, when may a subsequent promise of recompense be enforced?

What if one pays by mistake the debt of another, as, for instance, a tax on another's land, not as a voluntary agent on behalf of another, but supposing it was a tax on his own land?

Section 25 (D).

In what cases may a promise unenforceable by reason of some rule or provision of law meant for the promisor's advantage be subsequently renewed and enforced?

In these classes of cases, on which promise is the action generally brought?

How is the new promise treated?

What if an indorser or drawer of a negotiable instrument who has been discharged from liability for want of due notice of dishonor promises to pay the note?

Section 25 (E).

What is the prevailing rule in this country where one person for a valid consideration makes a parol promise to another for the benefit of a third person?

Does the rule apply where the contract is under seal?

How has the rule been qualified in New York and some other states?

Can the parties to the transaction rescind or modify the contract?

Does the rule prevail in Massachusetts?

CHAPTER III.

THE STATUTE OF FRAUDS.

What is the substance of the 4th section of the English Statute of Frauds? (29 Car. II, c. 3.)

Has it been adopted in most of the states?

Section 26.

Is a verbal contract within the statute merely voidable or is it void?

By whom can the privilege of the statute be made available?

What if a verbal contract within the statute has been fully performed?

What if in pursuance of an oral contract for the sale of land a conveyance has been executed and accepted?

Can a verbal contract within the statute be made the ground of a defense?

Must the contract itself be reduced to writing?

What is a sufficient memorandum of the contract?

What is said of the form of the memorandum?

Must the memorandum be contemporaneous with the contract?

Must it pass between the parties?

Illustrate by example.

When is an undelivered deed by itself sufficient as a memorandum?

When may the memorandum be contained in a correspondence or different papers?

May it consist of telegrams?

When may an unsigned paper be considered part of the memorandum?

If it appears from the paper signed that another paper is referred to, how may the latter be identified?

How must the memorandum show who are the parties to the contract?

With what certainty must the memorandum show the subject-matter and executory terms of the contract?

What does the statute in Illinois and several of the other states provide as to the consideration?

What may be shown in order to apply the contract to its subject-matter?

What is said as to the signature?

What if the statute has the word "subscribed" instead of "signed"?

Must the memorandum be signed by both parties?

What if a written offer is orally accepted?

May the other contracting party sign as agent?

When must the memorandum of an oral contract by an agent be made and signed?

What if an authorized agent signs the memorandum in his own name?

Must the authority of the agent be in writing?

What if the contract is for the sale of real property?

What if one write and execute a contract within the statute by the hand of another?

Section 27.

What is the clause of the statute as to a special promise by an executor or administrator?

What is here meant by a "special promise"?

By "damages"?

What if an executor promise to pay a sum of money to an heir in consideration of his not contesting the probate of the testator's will?

What if an executor or administrator in consideration of forbearance promise to answer for a debt or liability of the deceased out of his own estate?

Section 28 (A).

What is the clause of the statute as to a promise collateral to the liability of another?

What is the plain object of the statute?

Does the statute change the common law as to the necessity of a consideration for the promise to answer for the liability of another?

What if such promise and the principal obligation are accepted by the promisee at the same time?

Section 28 (B).

What does the phrase "debt, default or miscarriage" include?

Section 28 (C).

What does the term "another person" here mean?

Is a promise by a partner made after the dissolution of the firm to pay a partnership debt a promise to pay the debt of another?

Is a promise by a stockholder to pay a corporation debt?

Section 28 (D).

In order to bring a promise within this clause of the statute, what five things must appear?

If goods are sold to A upon his credit and B promises to answer for the debt, is B's promise within the statute?

What if the goods are sold to A upon the sole credit of B?

Where services are rendered to A at the request of B, what is the test as to B's liability?

What, if any, credit is given to the one who receives the goods or services?

What if there is a promise to pay the debt of another in consideration of that other's release from the debt?

Where A owes B $100 and B owes C $100, and it is agreed by the three that A shall pay C the $100, is the promise of A to pay C within the statute?

Where the promisor has funds in his hands belonging to the debtor from which he has authority to pay the debt, is the promise within the statute?

Is a promise to the debtor himself to pay his debts within the statute?

What if B sells goods to A, and A promises B to pay the purchase money to a creditor of B?

What if B, on the promise of A to indemnify him, becomes surety for C in an obligation to D?

Is a contract between cosureties fixing the proportion and extent of their several and correlative liability as between themselves within the statute?

What if the leading purpose of the promisor is to promote some interest of his own?

What if the holder of a promissory note transfers it for value and guarantees the payment of the note?

What if an agent (called a del credere agent) undertakes, for an increased

commission, to sell the goods of his employer and guarantee the payment of the purchase money?

What if the creditor of a third person has some lien which incumbers the property of the promisor and the promise is made in consideration of the relinquishment of such lien?

What if the promise is not primarily and mainly for the benefit of the promisor?

What is said of an agreement to make a collateral promise?

Section 29.

What is the clause of the statute relating to marriage?

Does the clause apply to an agreement consisting of mutual promises to marry?

In such case what is the consideration for each promise?

What is the promise contemplated by this clause?

Is the marriage itself such a part performance as to take the promise out of the operation of the statute?

What if, after mutual promises to marry, the parties make a distinct agreement in contemplation of their marriage, but not in consideration thereof?

Section 30.

What is the clause of the statute as to an agreement not to be performed within one year?

What if no time for performance is stipulated and the agreement admits of full performance within the year?

Give an illustration.

Does this clause apply to an agreement to marry after the expiration of a year?

To an agreement to marry generally?

To an agreement to marry "within" a period of more than a year?

What if the agreement may be fully performed within a year although it is not probable or expected that it will be?

What was held where the defendant agreed to put down the iron rails for a switch on its railroad "and maintain the switch for plaintiff's benefit for shipping purposes as long as he needed it"?

Where the agreement was to support one during his life?

Where the agreement was to give employment so long as the employer is engaged in a particular business?

Where the agreement was to refrain generally from doing business in a certain locality?

Where the agreement was for insurance?

Where the agreement was to pay for services out of the assets of one's estate upon his death?

Where the agreement was to pay for services upon a sale of land?

Where the agreement was for the purchase of crops of two successive years?

Where the agreement was to render services for a year, to commence at a future time?

For a period of more than a year?

What if the employee has rendered services in part performance of an oral contract and the employer sets up the statute in avoidance of the contract?

What has been held where there was an agreement for a lease for a year to commence at a future time?

Where one of the parties is to perform, and does perform, immediately or within a year, and the other is not to perform within the year?

Section 31 (A).

What is the provision of the statute as to a contract for the sale of real property or an interest therein?

What do the words "lands, tenements and hereditaments" denote?

How are growing crops (fructus industriales) regarded for most purposes?

May they be sold and transferred as personal property?

How are the natural growths of the soil (fructus naturales), while growing or standing, treated?

When does such growth become a chattel?

What has been held in England and a few of the states where a contract for the sale of such growth contemplated its severance from the soil presently?

Does a contract for the sale of an "interest in or concerning" real property include a contract for the transfer of the interest of a purchaser under an executory contract?

Does the statute apply to a contract for a permanent right of way?

At common law, what would such a contract amount to?

What has been held in some of the states where the license has been acted upon and considerable expense incurred?

What was held where there was a contract for the use of a hall for parties on the afternoons of certain holidays?

What was held where there was an agreement, made at the time of the delivery of a deed of conveyance, that the grantee shall not carry on the liquor saloon business on the land?

That there should be an abatement of the price in case of a deficiency in the land?

Is a contract for the sale of both real and personal property founded upon a single consideration within the statute?

Is a contract in the alternative where one alternative is within the statute,—as a contract to convey land or pay money?

Is a contract to convey land to a purchaser whom the promisee shall find, and to pay him for his services all money received above a stated sum?

Is a contract for a partnership for the purpose of buying and selling lands for a profit?

What if lands already owned by the parties or either of them separately, having been acquired by individual funds, are to be put into partnership or corporate property?

Section 31 (B).

Does the statute apply to judicial sales?

Section 31 (C).

When will a court of equity decree a specific performance of a contract within this provision of the statute?

What must generally appear as to the possession?

What if there was the mere continuance of possession taken before the contract was made?

What if a party claiming under an oral agreement was in possession under a prior agreement and, continuing in possession, puts lasting and valuable improvements upon the premises?

What if there is possession in pursuance of the contract and payment of the purchase money or performance of the consideration?

What if there is merely taking possession in pursuance of the contract?

What if there is mere payment of the purchase money?

What if there is an interchange of possession under an oral contract to exchange lands?

What if there are valuable and permanent improvements on the faith of the contract?

When will a court of equity decree a specific performance of a parol gift of land?

What was the English Statute of Frauds relating to the sale of goods? (17th section, 29 Car. II, c. 3.)

Is it in force in this state?

CHAPTER IV.

CAPACITY OF PARTIES.

What persons are incapable wholly or partially of binding themselves by contract?

Who were minors at common law?

When does a person attain his majority?

What is the age of majority for females in some of the states, including Illinois? (Rev. St. Ill., ch. 64, sec. 1.)

In law language, what are minors commonly called?

What authority cannot be delegated by a minor?

What if a minor appoint an attorney to convey real property?

To confess a judgment?

When is the contract of a minor binding?

What if a minor give a bastardy bond?

What if there is a voluntary equal partition by parties, one of whom is a minor?

What if there is a conveyance to a proper party by a minor holding the legal title without any equitable interest?

What is the general rule as to the contracts of a minor?

Does a statute changing the common-law age of consent to marry make a minor's promise to marry binding?

What is the rule as to the contract of an adult with a minor?

Can a person not a party to the contract take advantage of the minority?

Can the maker of a promissory note avoid payment to an indorsee on the ground that the indorser is a minor?

Is an auctioneer bound to accept the bid of a minor?

In case of the minor's death or insanity, by whom may the contract be avoided or confirmed?

Why cannot the guardian of a minor avoid or confirm his ward's contracts?

At what time may the contract be avoided by the minor?

What if the minor conveys real property?

May he set up his minority in avoidance of a lease?

What if a minor falsely represents himself as of full age?

What if, under the circumstances of the case, the avoidance or the cancellation of the contract would operate as a fraud on the party deceived?

In what different ways may a deed of conveyance by a minor be conclusively disaffirmed when he comes of age?

Is a mortgage made during minority disaffirmed by a quitclaim deed made after attaining majority?

How may a deed to a minor be conclusively disaffirmed when he comes of age?

Section 39.

In what different ways may the contract be confirmed by the minor after attaining majority?

Where a new promise is relied upon as a ratification, to whom must it be made?

Is a mere acknowledgment sufficient?

What must the language used show?

What if the new promise relied on is to pay when able?

What acts clearly evince an intention to confirm the contract?

What was held where a minor under contract for service for a period extending beyond his minority voluntarily continued in the service after coming of age?

What if a person after his majority makes a deed reciting that the conveyance is subject to a mortgage given by him while a minor?

What if a minor upon receiving a deed gives a mortgage for the purchase money and after his majority sells the property?

What if a minor acquiesce in his deed of conveyance for years after reaching his majority in view of valuable improvements being made upon the land?

When or within what period after attaining majority will an omission to disaffirm a contract amount to a confirmation?

What has been held in Illinois in analogy to a statute of the state?

Section 40.

What if a minor avoids a contract on which he has received money or property?

What if the minor has during minority wasted or squandered the consideration or part of it?

What has been held where the minor has paid out money on a fair contract and has enjoyed the benefits of it?

Section 41.

What if services have been performed by a minor in partial or entire execution of an express contract and he avoids it?

Section 42 (A).

What is the rule as to necessaries supplied to a minor?

Is he bound by the express terms of a promissory note given for necessaries?

Can he make a binding executory agreement to purchase necessaries?

Is he liable for money paid at his request for necessaries?

Section 42 (B).

What does the term "necessaries" include?

Does the term include the services of a dentist?

A collegiate education?

What if the necessaries are improper as to quality or quantity?

Does the term include labor and material for the erection of a building?

Does it include the implements of a shop?

Does it include a horse needed and used in the business whereby the minor earns his living?

What if the minor's health requires him to ride?

In what cases does the term include professional services of an attorney?

What if the minor's wants are already supplied or he has a parent or guardian able and willing to provide for him?

Is the minor liable for necessaries furnished upon the credit of his father?

To what must the necessaries furnished be suitable?

How are necessaries for the wife and children of the minor treated?

PERSONS OF UNSOUND MIND.

Section 43.

What is the general rule as to a contract made by a person of unsound mind?

Under what circumstances is such a contract binding?

When is mental weakness not sufficient ground for a voidance of a contract or conveyance?

In whose favor is the contract or conveyance voidable?

Can it be avoided by the other party?

What if a person of unsound mind gives a power of attorney to convey real property?

What if a person of unsound mind brought on that condition by habitual drunkenness?

What if one, having knowledge or reasonable cause to believe that another is of unsound mind, deals with him for other than necessaries?

What if the person of unsound mind receives no benefit from the contract?

What if he is an accommodation indorser?

What is generally held where a contract with a person of unsound mind is fair and beneficial to him and made without knowledge or notice of his mental infirmity?

Where a contract is voidable in favor of a person of unsound mind, is it also voidable as against a purchaser without notice and for full value from the same party?

Section 44.

When is a contract made by a monomaniac binding?

Section 45.

When is a contract made by a lunatic binding?

Where a condition of general mental derangement is shown to exist at a recent period anterior to the time of the contract, not resulting from a temporary or transient cause, such as a fever or periodical fits, what will be presumed?

By whom may the contract of a person of unsound mind be avoided?

When may the contract of such person be ratified by him?

Section 46.

May a person of unsound mind bind himself for necessaries?

What if he is under a conservator or guardian?

What if the necessaries are for his wife and children?

Section 47.

Is an insane person or idiot capable of contracting marriage?

DRUNKEN PERSONS.

Section 48.

What is the rule as to a contract made by a drunken person?

What if there is a less degree of drunkenness which only darkens the reason?

What must the drunken party do in order to avoid the contract?
When may the contract be confirmed?

PERSONS UNDER CONSERVATORS.

Section 49.

What is the general rule as to a contract made by a person while under a conservator?
What if there is the mere commitment of a person to a hospital for the insane?
What if at the time the contract was made a conservator had not been appointed?

CORPORATIONS.

Section 50.

What is a corporation and what capacity has it to make contracts?
When is an engagement by a corporation said to be ultra vires?

Section 51.

When is a contract within the scope of the powers of a corporation?
What power does the power to borrow money carry with it as an incident?
What is an incidental power?
When may the contract of a corporation embrace something which by itself unconnected with the corporate purpose would be ultra vires?
Give an illustration.
What if the contract is in violation of a general law applicable to individuals or is contrary to public policy?
Give an illustration.
Has a corporation organized for the mere purpose of mining limestone and manufacturing lime for sale, authority to buy lime in the market for the purpose of resale as a speculation?
Can public or quasi-public corporations, such as railroad corporations, gaslight companies and the like, sell or lease their corporate powers and privileges?

Section 52.

What if a contract ultra vires has been performed by one of the contracting parties and the other has actually received the benefit of it in money, property or services?
According to the rule of the Supreme Court of the United States, is a contract ultra vires enforceable by application of the principle of estoppel?

Section 53.

Where a contract entered into by a corporation is within the general scope of the powers conferred upon it and has been performed by one of the parties, can the other set up as a defense to an action on the contract that legal formalities were not complied with or that the power was improperly exercised?

Give an illustration.

What if the contract has been fully performed on both sides, as where land is conveyed to and paid for by a corporation?

Section 54.

How can a corporation make a contract within the scope of its powers?

May a corporation be liable on a contract implied by law?

CHAPTER V.

VOIDABLE CONSENT.

Section 55.

What is essential to an absolutely binding contract as to consent?

When is apparent consent not real?

In such case by whom may the consent be avoided?

In the case of mistake, misrepresentation or fraud, within what time must the contract be avoided by the innocent party?

In the case of duress or undue influence?

In what cases is mistake a ground for avoiding a contract?

What if a person unable to read is misinformed as to the contents of the contract?

May he avoid the contract in the hands of an innocent holder for value?

What if a person able to read executes a deed, supposing it to be a lease, without reading the same?

What if a surety signs a note in the absence of the payee and on the representation of the maker as to its contents without reading it or having it read to him?

What if the signature to a negotiable instrument in the hands of an innocent holder for value was obtained by some trick or artifice?

Where A sends an order for goods to B, can C make himself a party to the contract without the knowledge or consent of A, by supplying the goods in the place of B?

Why not?

What if A receives notice that the goods have been furnished by C on his own account and thereafter appropriates the goods?

What if an imposter obtains possession of goods through the semblance of a sale to a responsible firm by means of a false statement that he was a member or agent of the firm?

What if A, the imposter, in person induces the owner to make the contract and deliver possession of the goods by pretending to be B, a reputable merchant?

What if the thing which the parties suppose to exist, and the existence of which is essential to the creation of the contract, has no existence?

Give an illustration.

What if there is the sale of an article containing a secret treasure?

What if, after parties have apparently agreed to the terms of a contract, circumstances disclose a latent ambiguity in the meaning of an essential word, by which one of the parties meant one thing and the other a different thing, the essential word being applicable to both?

Give an illustration.

What if there is a mistake as to the price, which is the result of oversight or error in computation by one of the parties and is known to the other?

What was held where a blooded cow was contracted to be sold for $80 upon the understanding of both parties that she was barren and useless for the purpose of breeding, when in fact she was with calf and as a breeder was worth at least $750.

What if there is a mutual misunderstanding as to the mere value or quality of the thing, and not as to its very nature or kind?

Section 57.

What if there is a mere mistake as to a law in force in this state?

When will a mistake of law include a mistake as to the legal effect of a contract?

What if after making an agreement, in process of reducing it to a written form, the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into?

What if there is a mistake as to the existence of a particular private right—such as the right of ownership—when it is the essential subject-matter of a contract?

What if there is ignorance of the law of another state or country?

MISREPRESENTATION.

Section 58.

When is misrepresentation, as distinguished from fraud, a ground for avoiding a contract?

What if the other party knew that the representation was untrue, or without relying thereon, made independent inquiries and acted on information derived from his own investigation?

When may a contract for the sale of land be avoided where there is a misdescription of the land, although not proceeding from fraud?

If an untrue statement of a material fact by a seller is the cause of a purchase, is it material to the purchaser whether the statement was made innocently or dishonestly?

What if an untrue statement of a material fact by a purchaser (e. g., as to his financial ability) is the cause of the sale?

What if a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract?

What is said of the contract of insurance?

Is an applicant for insurance bound to give information to the insurer on any fact which the latter may be presumed to know?

Where a policy of insurance is issued upon a written application furnished by the insurer, with questions and answers, will an innocent failure to communicate facts not inquired about avoid the policy?

What if upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry?

What if one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two?

What if to the same question he merely answers that the property is incumbered, without stating the amount of the incumbrances?

What if a material misrepresentation, relied upon by the insurer, is innocently made?

What if a misrepresentation (not a warranty) is made in good faith and is not material?

Between what parties does their confidential relation require full disclosure of material facts in contracts?

FRAUD.

Section 59.

In what acts does fraud considered as a ground for avoiding a contract consist?

What if a fraudulent act is committed with the connivance of one of the parties?

Will misrepresentation without a dishonest intention sustain the action *ex delicto*, the action of deceit.

What if the misrepresentation was not made with the intention that it should be acted upon by the party subsequently injured?

Need the misrepresentation be made directly to the party acting upon it?

What if it is made to a commercial agency?

Where goods have been obtained on credit by means of representations known to be false, is it a defense that the buyer expected to be able to pay for them and had no intention of subjecting the seller to a loss?

Must the misrepresentation be relied upon?

Will a party guilty of fraudulent misrepresentation be allowed to allege the negligence of the other party in relying upon it under circumstances justifying belief?

What if the latter knew or had the means of discovering the truth and used them?

What if the innocent party was not induced to enter into the contract by the misrepresentation?

Must the misrepresentation have been the sole inducement?

What if the misrepresentation was immaterial?

What if there is a false representation as to a mere matter of law?

What if in such case there is a fiduciary or confidential relation?

What if there is a false representation as to a mere matter of opinion.

What if it is made by an expert or one presumably possessed of superior knowledge on the subject?

What if there is a representation as to the value of an article or land?

What has been held as to a statement by the seller as to the price paid by him or offered to him?

What if there is a statement as to the price paid by a third person or as to the selling price?

As to the cost of manufacturing an article?

That a business is earning a certain sum per day or year?

As to a mere matter of intention or as to what would be done in the future?

What if there is a false representation recklessly made without any knowledge or ground of belief?

What if there is the use of any artifice or contrivance in the sale of goods to mislead and prevent discovery of their defects?

What if there is a partial statement of fact where the withholding of that which is not stated makes that which is stated so misleading as it stands as to be in effect untrue?

What if the presentation of that which is true creates an impression which is false?

When is a promise by the purchaser to pay for goods false and fraudulent?

What if the omission of a purchaser to disclose his insolvency is unaccompanied with an intention not to pay?

What if a man really struggling against adversity makes a valid purchase on credit with an honest intent to retrieve his fortunes, but without disclosing the extent of his embarrassments?

Is a purchase rendered fraudulent by a mere intent not to pay when the debt becomes due?

DURESS.

Section 60.

In what acts does duress, considered as a ground for avoiding a contract, consist?

What is duress *per minas?*

What if the duress was with the connivance of one of the parties?

What if the party alleging duress was not coerced by the restraint or threat?

What language will not constitute duress?

What must be the character of the constraint or danger to constitute duress?

What is necessary to establish duress by imprisonment?

What would be an abuse of criminal process?

Of civil process?

When would imprisonment be unjustly oppressive?

Between what parties is the relation so intimate that the constraint upon one is supposed to operate upon the other?

In such case what if the threat is of lawful imprisonment?

What if a surety voluntarily enters into a contract with knowledge of the duress of the principal?

What if there is a threat to take life or to inflict great bodily harm?

To commit suicide?

What if one institute or threaten to institute a civil suit or ordinary legal proceedings against property?

What if money is paid under protest to prevent the seizure of goods under a warrant for the collection of an illegal assessment or tax?

What if money is illegally exacted by a carrier or other person as condition to the delivery of property in his possession or under his control?

What if money is illegally exacted under circumstances which threaten serious loss in business?

What if a contract is procured by threats and the fear of the destruction of property?

UNDUE INFLUENCE.

Section 61 (A).

Under what different circumstances may a contract be avoided on the ground of undue influence?

What must be the character of the influence to justify the avoidance of the contract?

What if a social or domestic force is exerted on a party which controls the free action of his will and prevents voluntary action in the making of a contract or the execution of a deed?

To what extent may argument and persuasion be used?

Is it lawful to influence a weak-minded person to do that which is just and for his good?

What if a contract is entered into between parent and child?

To whom does the term "parental" extend?

What if a contract is made with a grandparent, grandchild, uncle, aunt, nephew, niece, brother or sister?

What if a contract is made between husband and wife?

Between betrothed parties?

Between what persons does a fiduciary or confidential relation either in a general or a limited sense subsist?

In general, to what cases does the principle apply?

When confidence and influence in a transaction are presumed from the special relation of the parties or proved by extrinsic evidence, upon whom is the burden of proving the fairness of the transaction?

May the absence of undue influence and the fairness of the transaction appear from the circumstances of the case?

What is the distinction as to presumption of undue influence between a contract or gift *inter vivos* and a gift by will?

Where a relation of confidence is once established, how long is it presumed to continue?

By what may the mind be enfeebled and what must be the character of the mental weakness to authorize a court of equity to set aside a contract?

What if an expectant heir assign his expectancy?

Does the principle apply to an expectant devisee or legatee?

Section 61 (B).

If it is once established that a person who stands in a position of commanding influence toward another has obtained a considerable advantage from him while in that position, what will be presumed?

CHAPTER VI.

LEGALITY OF OBJECT.

Section 62.

What if the object of an agreement is forbidden by law or is opposed to the policy of the law?

Is it material whether the object is forbidden by the constitution, by a statute, or by the common law?

Whether the thing forbidden by law is ***malum in se*** or merely ***malum prohibitum?***

Does comity between different states require a law of one state to be executed in another when it would be against the public policy of the latter state?

What if there is an agreement in furtherance of a criminal offense, e. g., publication of a libel?

What if there is a private stipulation by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts?

In such case have the innocent creditors the right to enforce their original claims?

Has the fraudulent creditor such right?

What if property is conveyed for the purpose of defrauding creditors with an agreement for a subsequent reconveyance?

What if there is an agreement whereby a person of skill or reputation in his profession authorizes another to personate him?

An agreement for the sale of goods to be furnished with deceptive labels?

Section 63.

How may a statute forbid the performance or omission of an act?

Can a real estate broker who has not taken out a license required by statute of persons engaged in that business recover compensation for his services?

Where a statute in terms directs that sales of oats and meal should be "by the bushel," can an action be maintained for the price if sold by the bag?

Section 64.

What does a penalty imposed by statute imply?

What if the penalty is merely to secure the revenue?

Give an illustration.

Where the statute imposes a penalty for retailing intoxicating liquors without a license, are sales thereby prohibited?

In determining whether or not a penalty implies a prohibition, to what will the courts always look?

Give an example.

LEADING CLASSES OF AGREEMENTS OPPOSED TO THE POLICY OF THE LAW.

Section 65 (A).

Mention the leading classes of agreements opposed to the policy of the law.

What is said of trading or commercial intercourse between the subjects of the belligerents during a state of war?

Does the prohibition apply to a subject domiciled in a neutral country?

What if the subject of an enemy publicly residing in this country is not ordered away by the government?

May legal proceedings on pre-existing contracts be maintained against an alien enemy or his property if found within the jurisdiction of our courts?

What is said of subsisting contracts with alien enemies?

Of commercial partnerships?

Of executory contracts?

What if an agreement contemplates action hostile to a friendly nation? Give an example.

What if an agreement is made with the view to the breach of the law of a sister state? Give an example.

Section 65 (B).

What if there is an agreement to use one's influence to secure the election or appointment of a person to public office?

To withdraw from a candidacy for public office?

To sell a public office or to assign the salary or fees thereof by way of advancement, before they are earned?

To use one's personal influence, in distinction from purely professional services, to procure some desired legislation?

Why does the law refuse to recognize all such agreements, however innocent?

What if there is an agreement to pay money to a land owner for his personal influence, by petition or otherwise, with the public authorities for a public improvement?

What if there is an agreement between a railroad corporation or any of its officers and an individual to establish exclusively a station at a particular place?

What if the agreement is without any restriction or prohibition as to any other location?

Section 65 (C).

What if there is an agreement to compound a crime or stifle a criminal prosecution?

To avoid an agreement on this ground, what must appear?

When may a person receive compensation for the private injury occasioned by the commission of a criminal offense?

What if there is an agreement for private pay to procure evidence?

To suppress evidence?

Section 65 (D).

What is maintenance?

What is champerty in most of the states?

By whom can the question of maintenance or champerty be raised?

What if one has some independent interest in the subject-matter or result of the litigation?

Section 65 (E).

What is said of agreements which involve sexual immorality?

Section 65 (F).

What is said of an agreement in restraint of marriage?

Of a restriction as to marriage under twenty-one years of age?

Of a condition by husband or wife in restraint of second marriage?

Of an agreement to procure or bring about a marriage for reward?

Of an agreement between husband and wife providing for a possible separation in the future?

What if a separation has taken place or an immediate separation has been decided upon?

What is said of an agreement between husband and wife having for its object a divorce?

Of an agreement by a husband to pay his wife a certain sum of money if she would ignore former matters of dispute and observe marital duties?

If she would dismiss proceedings for a divorce and renew the conjugal relation?

Section 65 (G).

What is said of agreements in restraint of trade?

When will an agreement in partial restraint of trade be upheld?

Give an example.

What if the buyer of property agrees that he will not use the same in competition with the business retained by the seller?

What if a person upon sufficient consideration promises to buy of or sell to another exclusively a certain kind of goods for some local business?

Give an example.

What has been held where the restricted area embraces an entire state and a

citizen thereof is compelled to transfer his residence and allegiance to another state in order to follow his chosen line of business?

Does the general doctrine apply to the sale of secret processes or patent rights?

What if several owners of distinct patents combine for the purpose of restraining competition?

What is said of combinations whose object is to create "corners" in the market?

Of combinations for the purpose of preventing or destroying competition in a quasi-public employment or in any lawful business?

What has been held in New Jersey and Pennsylvania as to combinations of capital although they destroy competition and create monopolies?

What is declared by act of Congress (July 2, 1890) as to combinations and trusts in restraint of trade?

Section 65 (H).

What if there is an agreement not to bid at a public sale or at a public letting?

When will an agreement between two or more persons that one shall bid for the benefit of all be upheld?

Section 66.

What if property is leased with knowledge that the lessee intends to use it for an illegal or immoral purpose?

When will knowledge by the seller that the property he sells is designed by the purchaser to be used for an unlawful purpose prevent recovery of the price?

What if a person lends money for the express purpose of enabling the borrower to commit a specific unlawful act?

What if losses have been made in an illegal transaction and a person lends money to the loser with which to pay the debt?

Section 66 (A).

Where a party has paid money or delivered goods or conveyed real estate under or in furtherance of an unlawful agreement, what will the court generally do?

What maxim expresses the rule?

When will a broker be unable to recover for services rendered or losses incurred?

What if one of the parties was induced to enter into the unlawful agreement under circumstances of oppression or imposition?

What if the object or design which renders the agreement unenforceable remains unexecuted?

What if the object of a statute is to protect one class of persons against another?

What if an attorney has taken more than the statutory allowance for services in procuring a pension?

THE INTERPRETATION OF CONTRACT.

CHAPTER VII.

RULES.

When is there no room for construction?

Section 67.

In construing a contract, what is the controlling consideration?
How is the word "or" sometimes construed?
What is said of a strict grammatical construction?
Of the plural language?
Of punctuation?

Section 68.

What is the rule as to the whole and each part of the contract?
How are general words of release in an instrument restricted?
What if there is an omission or obvious mistake on the face of an instrument, but it is manifest therefrom what was intended?

Section 69.

In what sense are the words of a contract to be understood?
What if by usage of trade they have acquired a peculiar sense?
When is evidence of a usage not admissible?
In what sense are the terms of mercantile contracts to be understood?
When will a mercantile usage be considered as established?

Section 70.

How are technical words to be interpreted? Illustrate.
What if they are clearly used in a different sense? Illustrate.

Section 71.

With reference to what are the words of a contract to be construed?
What is said of the words "until," "from," and the like?
What was held as to the meaning of the word "loading" in a clause of insurance providing "the risk to be suspended while vessel is at Baker's Island loading"?
In what position do courts endeavor to place themselves in order to understand the language in the sense intended by the parties?

By reference to what may the meaning of the language used in a contract be enlarged or limited?

Section 72.

However broad may be the words of a contract, to what things does it not extend?

Where general words follow others of more particular meaning, how are they generally to be construed?

Section 73.

When are several instruments to be taken and construed together as forming one contract?

Give an illustration.

What if a contract is partly written and partly printed and these parts are inconsistent?

Section 75.

What if there are words in a contract which are wholly inconsistent with its nature or with the main intention of the parties?

Section 76.

What if a contract is susceptible of two constructions, one of which would make it legal and the other illegal?

What is said of a construction that would give one of the parties an unreasonable advantage over the other?

Between different meanings which is to prevail, that which supports the contract or that which would render it inoperative?

Section 77.

What if the parties by their acts have practically given the contract a certain construction?

Section 78.

Against which party is the language of a contract to be taken most strongly?

When only is this rule to be resorted to?

Why are ambiguous words and clauses in a policy of insurance construed most strongly against the insurer?

How is an exception or reservation in an instrument to be construed?

What is the true principle of sound ethics where the language of the promisor is fairly susceptible of different constructions?

Why is a legislative grant construed most strongly against the grantee?

How are provisions for forfeiture construed?

THE DISCHARGE OF CONTRACT.

Section 79.

In what different ways may a contract be discharged?

CHAPTER VIII.

DISCHARGE OF A CONTRACT BY AGREEMENT.

Section 80.

What if there is a mere agreement to rescind a contract which has been performed on one side?

How may liability upon a negotiable instrument be discharged?

In a bi-lateral contract, what is the consideration for its discharge by mere agreement?

How may two persons engaged to marry each other rescind the engagement?

May an agreement to rescind a contract be implied?

Section 81 (A).

When may a contract be discharged by a change in its terms?

Section 81 (B).

What if there is a mere promise to accept performance at a time or place other than that stipulated?

Section 82.

What if the parties to a contract make a new and independent contract concerning the same matter, and the terms of the latter are inconsistent with those of the former?

Section 83.

What is the general rule as to how a contract may be released?

What if the contract is under seal?

Or required to be in writing by the Statute of Frauds?

What if a party on the faith of such parol or oral agreement has so acted and altered his position as to render it inequitable to hold him to the original contract?

Section 84.

What if A owes B $100 and B owes C $100, and it is agreed by the three that A shall pay C the $100?

Why must all three agree to the substitution?

CHAPTER IX.

PROVISIONS FOR DISCHARGE.

What three provisions for the discharge of a contract are mentioned?

Mention a contract made determinable upon the non-fulfillment of a term of the contract?

By the fulfillment of a condition subsequent?

By the occurrence of an event?

Section 88.

What if a contract provides that either party may terminate it on giving a specified notice?

CHAPTER X.

DISCHARGE OF A CONTRACT BY PERFORMANCE.

Section 89.

What is the rule as to discharge of contract by performance?

Where one promise is given in consideration of another, does performance by one party release the other?

Section 90.

What is the rule as to modification of the performance of a contract? Illustrate.

Section 91 (A).

What is the performance of a contract for the delivery of money called?

What is the presumption where a negotiable instrument is taken in lieu of payment?

Section 91 (B).

What is the exception to this rule?

Section 92 (A).

What if a promisor makes a proper offer of performance to the promisee and the offer is not accepted? Illustrate.

Section 92 (B).

What is an exception to this rule?

What is the effect of a tender?

CHAPTER XI.

IMPOSSIBILITY OF PERFORMANCE.

Section 93.

What is the general rule where there is a positive contract to do a thing possible in its nature and by law?

Where a lessee covenants to keep the demised premises in repair and at the determination of the lease to surrender them in as good condition as they were at the date of the lease, what if the buildings are destroyed by fire during the term?

Where a person contracts to build and complete a house on the land of another, what if the house before its completion falls by reason of a latent defect in the soil?

When, however, will the parties not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens?

Section 94.

In what three cases will an undertaking in general terms to do a thing not be construed to be absolute and unconditional?

Section 94 (A).

Illustrate the case of a specific thing whose continued existence is essential to the performance of the contract, but which is destroyed or exhausted, without the fault of the promisor?

Why is the lease of part of a building, as a cellar or upper room, discharged by the destruction of the entire building?

Where one is to make repairs or do any other work on a house, and his contract becomes impossible of performance on account of the destruction of the house by fire, what is generally held as to recovery for what he has done?

In some jurisdictions, upon what does liability for the part performance seem to depend?

State a case where the contract was held to be entire.

To be severable.

Section 94 (B).

Illustrate the case where the undertaking is for the personal services of the promisor, and the performance becomes impossible by reason of his death, insanity or incapacitating sickness.

In such cases, what is the rule as to the recovery of the value of part performance?

Section 94 (C).

Illustrate the case where the performance becomes impossible by reason of a change in the law?

By reason of some action by or under the authority of the government?

Section 95.

What if a party has an option to perform his contract in either of two modes and one of the modes becomes impossible? Illustrate.

CHAPTER XII.

DISCHARGE OF CONTRACT BY OPERATION OF LAW.

In what different ways may a contract be discharged by operation of law?

MERGER.

Section 96.

What is the rule as to merger?

What if the new security is of equal degree with the old one?

What if the remedy given by the new security is not co-extensive with that given by the old one?

What is the presumption where a higher security is between different parties or for a different sum?

What if it appears that a higher security is accepted merely as an additional or collateral security for a pre-existing debt?

ALTERATION OF A WRITTEN INSTRUMENT.

Section 97.

What is the rule as to alteration of a written instrument?

Where a note has been altered can recovery be had upon the consideration for which it was given?

What if the alteration was due to mistake of fact or mere inadvertence?

What if the alteration is immaterial? Illustrate.

What is said of a material alteration which would not operate to the prejudice of the promisor?

Of an alteration which hastens or delays the time for payment?

Which only expresses what the law would otherwise imply? Illustrate.

Which is made by a stranger?

By an agent who had no authority to make it?

What if a party to a contract consents to an alteration?

What if there is an alteration in a deed of conveyance?

What is said of the obligations in favor of a party not consenting to the alteration?

Of several promisors who are bound by the alteration and who are discharged?

BANKRUPTCY.

Section 98.

What is the rule as to a discharge in bankruptcy?

CHAPTER XIII.

DISCHARGE OF CONTRACT BY BREACH.

Section 99.

In what different ways may there be such breach of a contract by one of the parties as will authorize the other to avail himself of the breach as a discharge from further performance on his part, and bring an action for compensation in damages?

Section 99 (1).

What if one of the parties before the time of performance arrives repudiates the contract and declares he will no longer be bound by it?

Give an example.

Is the rule applicable to unilateral contracts, such as promissory notes?

To cases where the repudiation is only partial?

Section 99 (2).

What if the renunciation be made in the course of performance of the contract?

Give an example.

What if the manufacturer or dealer, notified before or during performance of such renunciation, goes on and by full performance on his part increases the damages?

Where one party to a contract repudiates it what election as to remedies has the injured party?

When cannot a renunciation be retracted?

Section 99 (3).

What if one of the parties, before the time for performance arrives, does some act which makes it impossible for him to perform his promise?

Give an example.

Section 99 (4).

What if the disabling act be done in the course of performance of the contract?

Give an example.

Section 99 (5).

In ordinary contracts for the sale of goods what are concurrent conditions in the nature of mutual conditions precedent?

In ordinary contracts for the sale of lands?

In ordinary contracts for service for a certain length of time what is a condition precedent?

What has been held in such cases in some of the states?

What is held where, by the terms of a contract, the time to perform the promise on the one side is to arrive or may arrive before the time for the performance of the promise on the other side?

What is held where, in a contract for the sale of land, the purchase money is to be paid in instalments falling due in one, two, and three years, respectively, and the deed of conveyance is to be executed at the time of the last payment?

In such cases what is held in some jurisdictions if the vendor defers action for the prior instalments until the last instrument falls due?

How is the question whether covenants are to be held dependent or independent of each other to be determined?

Section 99 (6).

When is time of performance of the essence of the contract?

How may a stipulation either express or implied that time shall be of the essence of the contract be waived?

In a mercantile contract how is a statement descriptive of the subject-matter or of some material incident such as the time or place of shipment ordinarily to be regarded?

What if the failure to perform a contract is in respect to matters which would render the performance of the residue a thing different in substance from what was contracted for?

What if the substantial part of the consideration, embracing several stipulations or acts, has been received by the defendant and the non-performance of one of them does not materially impair the benefit from the performance of the others and the loss occasioned by the breach may be compensated in damages?

What class of contracts illustrate the principle and its application?

CHAPTER XIV.

DISCHARGE OF RIGHT OF ACTION.

Section 100.

In what different ways may the right of action arising from a breach of contract be discharged?

RELEASE.

Section 101.

How must the release of a right of action be made?

ACCORD AND SATISFACTION.

Section 102.

When does an accord and satisfaction take place?

What if there is an agreement whereby it clearly appears that the promise (not the performance) of something new is taken for and in satisfaction of a claim?

May a promissory note made or endorsed by a third person be given and accepted in satisfaction of a debt?

In what case may a negotiable instrument obligatory upon the debtor alone be given in absolute satisfaction of a debt?

When does a check made expressly "in full" satisfaction operate as an accord and satisfaction?

JUDGMENT OF A COURT.

Section 103.

When does the judgment of a court discharge a cause of action by way of merger?

What is said of an interlocutory order?

Of the judgment of a court having no jurisdiction?

Why is a cause of action merged in a judgment rendered upon it?

What if a former action for goods sold upon credit failed because it was brought before the credit had expired?

What if the plaintiff failed on demurrer in his first action from the omission of an essential allegation in his declaration which is supplied in the second suit?

What if there is a judgment against the plaintiffs on the merits?

What if the judgment be set aside or reversed?

How may a final judgment in the plaintiff's favor be discharged?

LAPSE OF TIME.

Section 104.

What are called statutes of limitation and when invoked what is their effect?

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